IN THE

Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-796

MISSISSIPPI POWER & LIGHT COMPANY,
Petitioner

v.

UNITED GAS PIPE LINE COMPANY,
PENNZOIL COMPANY,
Respondents

STATE OF MISSISSIPPI,
Plaintiff-Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

CITATIONS

CASES

STATUTES AND REGULATIONS

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Mississippi Power & Light Company (MP&L) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-A21) is reported at 532 F.2d 412.

JURISDICTION

The judgment of the Court of Appeals (App. C, *infra*, pp. A23-A24) was entered on May 27, 1976. MP&L's timely petition for rehearing was denied on September 27, 1976. (App. D, *infra*, pp. A25-A26). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a common-law action by an electric utility against a jurisdictional gas pipeline for the tortious making and breaking of a long-term contract for the direct (non-jurisdiction) sale of natural gas should have been stayed pending reference to the Federal Power Commission for a determination whether the contract was tortiously made and breached, and if it was whether the Commission could approve a tariff filing by the pipeline which would exculpate it from liability.

2. Whether the stay while the Commission decides "a major part of the litigation", and makes "all findings that it believes will aid the prompt resolution of the dispute" has been kept in the bounds of moderation, or is a denial of that promptness of decision which in all judicial actions is one of the elements of justice.

STATUTE INVOLVED

Section 1(b), 15 U.S.C. 717(b) of the Natural Gas Act, 52 Stat. 821 (1938) which provides:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to

> natural gas-companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

STATEMENT

Petitioner Mississippi Power & Light Company (MP&L) brought this action on August 30, 1974 against United Gas Pipe Line Company (United) and Pennzoil Company (Pennzoil) to recover damages in the sum of $160 million for United's breach of a long-term gas sales contract entered into on December 28, 1967. MP&L alleged that United represented that it would be able to perform its obligations under the contract; that the representation was false, and that MP&L, believing it to be true, expended large sums of money in constructing and maintaining power plant facilities designed to burn natural gas as a primary fuel. MP&L also alleged that Pennzoil, the former parent of United, directed and induced United to breach the gas sales contract (App. G, *infra*, pp. A32-A90).

The State of Mississippi's motion to intervene as a party plaintiff was granted (App. H, *infra*, p. A100), and it filed its complaint in intervention, adopting MP&L's complaint in its entirety (App. I, *infra*, pp. A101-A102).

Jurisdiction of the district court was invoked on the ground of diversity of citizenship, 28 U.S.C. 1332(a)(1).

United and Pennzoil filed separate motions to dismiss MP&L's complaint, or alternatively to stay the action (App. J, *infra*, pp. A103-A106; App. K *infra*, pp. A107-A111). They gave as grounds for their motions that the

complaint raised numerous issues within the competency and primary jurisdiction of the Federal Power Commission.

Following oral argument on the motions, the District Court ordered United and Pennzoil to file answers, which they filed on March 24, 1975 (App. L, *infra.* pp. A112-A141; App. M, *infra,* pp. A142-A153). The District Court thereafter in a memorandum opinion delivered on April 2, 1975 denied the motions to dismiss, but granted the motions to stay (App. F, *infra,* pp. A29-A31). It accordingly entered an order to that effect on April 4, 1976 (App. E, *infra,* pp. A27-A28).

In the memorandum opinion the District Court stated that MP&L's common law action for damages was occasioned and necessitated, according to MP&L's contentions, by the misfeasance of United and Pennzoil, in that United knowingly and deliberately oversold its supply of natural gas well knowing that the ultimate effect would be an insufficient supply of gas to discharge its contractual obligations to MP&L. It concluded, though, that the Federal Power Commission probably had jurisdiction of MP&L's action, and that for that reason the District Court should defer to the Commission a decision of the controversy. It stayed the action to await a decision of the Commission as to its primary jurisdiction.

While the Court of Appeals held that the District Court "acted properly in staying the procedures and in referring the case to the Federal Power Commission so that that agency might exercise primary jurisdiction" it also held that on remand "the District Court should prepare an order which outlines with some specificity both the proceedings before the Commission that should be con-

cluded before the damage litigation should continue and the issues upon which the Commission's opinion is sought" (App. A, *infra,* p. A21; p. A19). Consequently it remanded with direction the case to the District Court for the limited purpose of that Court modifying its stay order (id, p. A21). Even so, though, the Court said "For a court to attempt to determine whether it or the FPC had final authority over all aspects of the damage action on the record before the District Court would be singularly unwise"; (id. p. A17) and that "By requiring the District Court to prepare an order in which certain issues are referred to the FPC, we do not intend to unduly restrict that agency's ability to assist the District Court. The agency is free to make all findings that it believes will aid the prompt resolution of the dispute". (id, p. A19, n.14).

The Court of Appeals, however, in attempting to determine the aspects of the damage action which it believed an informed opinion of the Commission would be of material aid to the District Court, discussed what it considered were five components of the dispute. (id, pp. A16-A17).

It held that the Commission could determine whether a tariff provision, such as Section 12.3 proposed by United, would immunize United from liability and provide it with a defense to the action by MP&L. (id, p. A 16). It pointed to its opinion in *State of Louisana v. Federal Power Commission,* 503 F.2d 844, 865-868 (1974) where it, in reversing a curtailment order of the Commission, also reversed a holding of the Commission that the curtailment order would provide an absolute defense to the damage actions against United, rendering unnecessary an exculpatory tariff, such as Section 12.3 proposed by United. (id, p. A7).

The Court of Appeals referred to a petition for declaratory order filed by United with the Commission a day or two before oral argument in the District Court on the motions to dismiss or alternatively to stay. It concluded that the Commission had not clearly articulated what, if any, its action would be on United's petition. (id, p. A8). The Commission's order clearly shows it will not determine whether United's shortage was caused by negligent or willful misconduct on United's part (App. N *infra*, pp. A154-A160).

Other determinations which the Court of Appeals expressed the belief might be of aid to the District Court will be discussed under reasons for granting the writ. Suffice it to say the Court said that "referral encompasses the major part of the litigation". (App. A, *infra*, p. A20).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals decided in a way in conflict with the decision of this Court in *Nader v. Allegheny Airlines, Inc.*, ____ U.S. ____ (1976), 96 S.Ct. 1978, 48 L.Ed.2d 643[1] an important federal question regarding the primary jurisdiction of the Federal Power Commission of a common-law action for fraudulent misrepresentations which induced the plaintiff to enter into a long-term natural gas sales contract with the defendant.

Even if the Commission's informed opinion might "be of material aid in the resolution of the damage action", as the Court of Appeals opined, that is not adequate grounds for referring this action to the Commission for

1. Although *Nader* was decided after the Court of Appeals delivered its opinion on May 27, 1976, MP&L in its motion for rehearing, urged the Court to follow federal law laid down in *Nader*.

trial and decision. In *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 304 (1973) the majority of a 5-4 divided court said that although it need not finally define the administrative jurisdictional issue, nevertheless in order for a governmental agency to exercise primary jurisdiction, there must be sufficient statutory support for it to decide the issues referred to it. And in *Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676, 684 (1965) it said that the primary jurisdiction doctrine comes into play only when enforcement of the claim in a court "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body."

The Natural Gas Act has not placed within the special competence of the Federal Power Commission a common-law action involving the question whether a jurisdictional pipeline falsely misrepresented its gas supplies in order to induce an electric utility to enter into a long-term gas sales contract. Indeed the Act does not even confer jurisdiction of the direct sale on the Federal Power Commission, *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 516-517 (1947). Nor does the Act abrogate state law claims, such as the claims of MP&L. MP&L's claims, as were those in *Nader*, and the statute (here the Natural Gas Act) are not "absolutely inconsistent." They, too, may coexist.

MP&L has not sought to restrain the Commission or United from curtailing deliveries of gas to it, nor has it interfered with the Commission in the exercise of its curtailment jurisdiction. The curtailment orders are not the gravamen of MP&L's claim. They were issued because United could no longer meet its contractual obligations. MP&L's claim is for United's false misrepresentations of

the adequacy of its gas supplies. Whether United falsely misrepresented the adequacy of its gas supplies is not an issue in the curtailment proceedings. The power of the Commission to issue curtailment orders stems from its transportation jurisdiction under Section 1(b). This limited jurisdiction does not vest the Commission with authority to determine whether false misrepresentations were made in a nonjurisdictional sale of natural gas.

2. The Court of Appeals, in holding that the Commission's resolution of five specific components of the dispute, will materially aid the District Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

First, the Court of Appeals has incorrectly held that a component of the dispute is the cause of United's shortage. Even if it were necessary to determine the facts and circumstances giving rise to United's gas shortage, a determination could be made only on the basis of evidence received at a public hearing; and this would be true whether the determination was made by the Commission or a District Court.[2] The Commission's expertise would not be a deciding factor. Courts have greater expertise than the Commission in weighing conflicting testimony, and in resolving common-law actions involving applica-

2. The Court of Appeals says that the Commission is reviewing the facts and circumstances that resulted in the shortage in order to determine what is a fair, equitable, permanent curtailment plan (App. A, *infra,* pp. A15-A16). The Court is mistaken. The Commission is engaged in determining, in context of a curtailment plan, whether a curtailment plan is unduly discriminatory which does not place in the lowest priority new and enlarged service initiated at a time when United knew it would soon be curtailing (App. N, *infra,* p. A158).

tion of state law. Moreover, courts are unbiased in actions against regulated industries.[3]

The cause of United's gas shortage in the context of the damage suit is a matter for the courts, and in the end must be determined by the courts, *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975).

The Court of Appeals was mistaken when it said that the Commission had not clearly articulated what, if any, its action would be on United's petition for declartory order. The petition was filed in an effort to persuade the Commission to decide MP&L's claims (App. A, *infra,* p. A8). The Commission declined to issue a declartory order on three of the four issues. One of the issues it refused to include in its order was whether United's shortage was caused by its willful misconduct. This is unmistakably shown by the following concluding paragraph: "Good cause has not been shown for granting United's petition for declaratory order and motion to consolidate, except as to the consolidation of the issue of the effect of United's tariff Section 12.1 on its general liability to curtail direct sales customers." (App. N, *infra,* p. A160).

The Court of Appeals gives as a reason for referral, "no federal policy or statute entrusts the decision to courts in the first instance", (App. A, *infra* p. A17). The action, in the constitutional sense, is a case or controversy within the jurisdiction of the courts, Art. III Sec. 2 Cl. 1 *Con-*

3. In *International Paper Co. v. Federal Power Commission,* 476 F.2d 121, 125-126 (5th Cir. 1973) and *State of Louisiana v. Federal Power Commission,* 503 F.2d 844, 865-866 (5th Cir. 1974) the court reversed decisions of the Commission exonerating United from liability on the ground of no record support, and further on the ground that United might be liable for creating the need to curtail.

stitution of the United States. Courts have traditionally exercised jurisdiction of actions for false representations. It is not a question of whether a statute has entrusted a decision to the courts in the first instance, but whether a statute has entrusted a decision to the Federal Power Commission.

Second, the Commission cannot accept a tariff exculpating United from past liability for false misrepresentations. The Natural Gas Act does not abrogate state-law or common-law claims, nor does it authorize the Commission to immunize a jurisdictional pipeline from claims arising after, or even before the wrong was committed. No power to immunize can be derived from the Commission's authority to curtail under its transportation jurisdiction. The power to curtail is not coextensive with the right to vindicate a wrong under state law. As was pointed out in *Nader,* where Congress has sought to confer the power to immunize "it was done so expressly." It was there said:

> The Court [*Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426] conceded that a common-law right, even absent a saving clause, is not to be abrogated "unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in order words, render its provisions nugatory."

Whether the Natural Gas Act authorizes the Commission to approve, as a part of a curtailment plan, a tariff provision, such as proposed Section 12.3, which would exculpate United from liability for state-law or common-law claims is a question of law for the courts and not the Commission.

The decision of the Court of Appeals is in conflict with the principle announced in *Gordon v. New York Stock Exchange,* 422 U.S. 659, 686-690 (1975). There the Court held that in a treble damage antitrust suit the question whether the system of fixed Commission rates, over which the Securities and Exchange Commission had active supervision under the Securities Exchange Act, was beyond the reach of the antitrust laws, was a question of law for the courts to decide, and in particular for the court in which the antitrust claim was raised.

The decision of the Court of Appeals is also in conflict with the principle enunciated in *Breen Air Freight, Ltd. v. Air Cargo, Inc.,* 470 F.2d 767 (2nd Cir. 1972) cert. den. 411 U.S. 932 in which it was held that in a treble damage antitrust suit where the issue was whether agreements approved by the Civil Aeronautics Board (CAB), immunized an air carrier from antitrust violations, the courts would determine in the treble damage action whether the agreements approved by the CAB met the requirements of 49 U.S.C. Section 1384, which relieves air carriers from antitrust laws on agreements between air carriers approved by the CAB. It was there said at p. 774

> "Finally, we see no need to direct the district court to stay, in its discretion, the proceedings in court pending administrative action by the CAB. The issues are not technical in nature, and there is no need to seek uniformity. Compare *Trans World Airlines, Inc. v. Hughes, supra,* with *Pan American World Airways, Inc. v. United States, supra.* Furthermore, the CAB cannot award damages, the only relief which the plaintiffs request. *Apgar Travel Agency v. International Air Trans. Association,* 107 F. Supp. 760, 711 (SDNY 1952); *Slick Airways, Inc. v.*

American Airlines, Inc., 107 F. Supp. 199, 211 (D.N.J. 1952). Whenever possible courts should avoid duplicated or drawnout proceedings. The efficient administration of justice demands it. See *Allied Air Freight, Inc. v. Pan American World Airways, Inc., supra,* 393 F.2d at 445; *Japan Line, Ltd. v. Sabre Shipping Corporation,* 407 F.2d 173 (2 Cir.), cert. denied, 395 U.S. 922, 89 S.Ct. 1774, 23 L.Ed.2d 239 (1969).

Likewise, whether the Commission can approve a tariff provision exculpating United from past liability for false misrepresentations is a question of law for the courts and not the Commission. Public utilities cannot by tariff or contract escape liability for their own negligence, false misrepresentations or past wrongs. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 91-94 (1955); *Fairfax Gas & Supply Co. v. Hadary,* 151 F.2d 939, 941 (4th Cir. 1945); 175 A.L.R. 38-74.

Nothing, therefore, would be gained by awaiting a decision of the Commission on the proposed Section 12.3 tariff provision. Approval or disapproval of an exculpatory tariff provision is not a matter within the discretion of the Commission.[4]

Nor would anything be gained by awaiting a decision of the Commission as to whether Section 12.1 of United's tariff exculpates United from liability for false misrepre-

4. In *Pan American P. Corp. v. Superior Court,* 366 U.S. 656, 665-66 the Court held that a pipeline company could recover an overcharge under a gas purchase contract in an action filed in a state court, even though the contract had been filed as the producer's rate schedule. It said that the rights under the contract were "traditional common law claims" and they did not "lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas."

sentations. United must not believe that Section 12.1 exculpates it, otherwise it would not have urged the approval of proposed Section 12.3.

Mr. Justice Brandeis, speaking for a unanimous court in *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, 290 (1922), said: *"Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law"* (Emphasis added). He went on to say at p. 294, that "The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary."

The rule laid down in *Great Northern* was reaffirmed in *United States v. Western P. R. Co.*, 352 U.S. 59, 69 (1956) and *Brown & Sons Lumber Co. v. Louisville & N. R. Co.*, 299 U.S. 393, 397 (1937). It was said in *Civil Aeronautics Board v. Modern Air Transport,* 179 F.2d 622, 624 (2nd Cir. 1950), that "it has been continuously asserted that courts have original jurisdiction to interpret tariffs, rules, and practices where the issue is one of violation, rather than reasonableness." The reasonableness of Sections 12.1 and 12.3 is not an issue in MP&L's action.

Third, the gas sales contract, if it need be construed, should not be referred to the Commission for construction, but should be construed by the courts. It is a Mississippi contract, and must be construed under the laws of that State and in accordance with the canons of contract construction. A construction of the contract by the Commis-

sion would not be binding on the courts.[5] Moreover in *Merle E. Rowan v. Allied Chemical Corp.*, 39 FPC 64 (1968) the Commission declined to decide contract questions referred to it by a federal district court on the ground that it was not the policy of the Commission to decide contract questions involved in a lawsuit being tried by a court. The Court of Appeals clearly departed from the accepted and usual course of judicial proceedings when it held that questions regarding the interpretation of a Mississippi contract for the nonjurisdictional sale of natural gas should be referred to the Commission.

Fourth, the Court of Appeals concluded that a fourth component of the dispute which should be referred to the Commission is MP&L's request for compensation from the customers of United who receive higher priorities. The Court had reference to its opinion in *Mississippi Public Service Commission v. Federal Power Commission,* 522 F.2d 1345 (5th Cir. 1975) cert. den. 50 L.Ed. 149 (1976) where it held that the imposition of compensation payments as a condition for the receipt of higher priority gas is within the statutory power of the Commission over the movement of such gas in interstate commerce.

MP&L and the Mississippi Public Service Commission have not asked that the compensation plan be made retroactive. If a plan were adopted, as a part of a curtailment program, it could not apply retroactively to curtailments

5. *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960); *World Airways, Inc. v. Northeast Airlines, Inc.*, 349 F.2d 1007, 1011-1012 (1st Cir. 1965), cert. den. 382 U.S. 984; *Skelly Oil Co. v. FPC*, 532 F.2d 177 (10th Cir. 1976); *Gulf Oil Corp. v. American Louisiana Pipe Line Co.*, 282 F.2d 401 (6th Cir. 1960); *Warren Petroleum Corp. v. FPC*, 282 F.2d 312 (10th Cir. 1960).

under prior plans because reparations are impermissible under the Natural Gas Act.[6] A plan, if included in a permanent curtailment program for United's system, would not immunize United from liability for accrued damages suffered by MP&L. It might, at the most, reduce future damages by the increased amounts paid by high priority customers to United for the credit of MP&L and other low priority customers. Consequently the trial of this action for damages already suffered should not be stayed until all of the issues in a permanent curtailment program are tried and decided by the Commission and the courts on petitions for review.

Fifth, the Court of Appeals would refer to the Commission for determination whether the payment of damages for false misrepresentations might "significantly affect the allocation decision." There is no nexus between claims for false misrepresentations and the Commission's power to curtail, or its power to determine the order of priority of service. MP&L's common-law claims should not be extinguished on some theory that if United were held liable it might violate the Commission's curtailment orders in an effort to mitigate the damages by delivering MP&L greater volumes of gas than it was entitled to under the curtailment orders. A reduction in liability to one customer would expose United to liability to customers who were excessively or unlawfully curtailed. Moreover, a violation of the curtailment orders would expose United to heavy criminal penalties under Sections 21 and 22, of the Natural Gas Act, 15 U.S.C. 717t, 717u.

6. In *F.P.C. v. Louisiana Power & Light Co., supra,* the Court, in upholding the curtailment jurisdiction of the Commission said in 406 U.S. at p. 644; "In addition a prescribed remedial order can have only prospective application."

3. The stay has not been kept within the bounds of moderation. As was said in *Landis v. North American Company,* 299 U.S. 248, 265 (1936) "The limits of a fair discretion are exceeded." The stay also, as was said in *County of Allegheny v. Frank Mashuda Company,* 360 U.S. 185, 196-197 (1959) denies "that promptness of decision which in all judicial actions is one of the elements of justice". In *Ricci v. Chicago Mercantile Exchange,* supra Justices Marshall, Douglas, Stewart and Powell, in their dissents, said in 409 U.S. at pp. 320-321 "And surely the right to a 'meaningful opportunity to be heard' comprehends within it the right to be heard without unreasonable delay".

It is self-evident that a referral of this action to the Commission for it to determine "a major part of the litigation" and make all findings "that it believes will aid the prompt resolution of the dispute" will unduly delay a trial in the District Court. *First,* the District Court, under the opinion of the Court of Appeals, must prepare an order which outlines with some specificity both the proceedings before the Commission that should be concluded before the litigation can continue, and the issues upon which the Commission's opinion is sought. Such an order could be prepared only after an evidentiary hearing for the Court of Appeals said that it would be singularly unwise for a court to attempt to determine whether it or the FPC had final authority over all aspects of the damage action on the record before the District Court.

Second, the Commission would need to determine, after notice and hearing, which of the issues referred to it by the District Court it had an adequate staff and the expertise to make the determinations. It also would have to determine whether there were other issues it could try

where its findings might in its opinion aid the court in resolving the dispute. Of even greater importance it needs to decide whether the new issues could be determined without unduly delaying a resolution of the issues for which the proceedings were instituted.

Third, the Commission would have to find a time when it could try the damage suit issues without interferring with its statutory duties.

Fourth, the Commission would then have to try and determine the damage suit issues.

Fifth, then there would be the delay incident to an appeal to the court of appeals of the Commission's findings and order.

With all of this delay, still the Commission would not have jurisdiction to right the wrongs done MP&L and its customers. Moreover the District Court held in its memorandum (App. F, *infra,* p. A30) that the findings and determination of the Commission would not be binding on the courts in the damage suit actions.[7] However the Court of Appeals cautioned "We have been careful not to articulate the exact effect of the findings of the Commission upon the subsequent litigation. . . . We believe that it is singularly inappropriate to determine at this point in this complex litigation what the effect of the Commission's decision will be before the nature and extent of the Commission's action is ascertainable", App. A, *infra,* p. A20. Trial of the damage suit issues before the Commission may, therefore, be an exercise in futility.

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7. In *Monsanto Company v. Federal Power Commission,* 463 F.2d 799, 807 (D.C. Cir. 1972) it was held that the FPC's determination would only be "advisory".

The Fifth Circuit in *Louisiana Power & Light Company, supra,* said in 526 F.2d at p. 910: "The Commission's delay in acting on a permanent plan for the United system is, of course, discouraging." It also said in *State of Louisiana, supra,* 503 F.2d at p. 864:

> FPC should bear in mind that the question is not whether United should 'bear responsibility for the shortage on its system'; rather it is who would get the gas that is now available. FPC seems to have been concerned with deciding the issue of United's culpability. It would seem to us that that question should be resolved in a damage suit.

The Federal Power Commission has not yet concluded hearing commenced on December 21, 1970 for the purpose of delineating a permanent curtailment plan for United. Its curtailment orders have been reviewed and reversed in *International Paper Company v. Federal Power Commission,* 476 F.2d 121 (5th Cir. 1973); *State of Louisiana v. Federal Power Commission,* 503 F.2d 844 (5th Cir. 1974); *Mississippi Public Service Commission v. Federal Power Commission,* 522 F.2d 1345 (5th Cir. 1975); and *Louisiana Power & Light Company v. Federal Power Commission,* 526 F.2d 898 (5th Cir. 1976). The failure of the Commission to obey the mandate of the Fifth Circuit in *Louisiana Power & Light Company v. Federal Power Commission, supra,* resulted in the Court entering an order on November 13, 1976 modifying an interim curtailment plan for United's system, and directing obeyance of the Court's mandate. (App. O, *infra,* pp. A161-A168). The Commission by order issued November 24, 1976 has taken steps to determine, as the Court had mandated, whether to continue in

force the four-priority plan, which the Fifth Circuit held had not been lawfully vacated, or to vacate the plan (App. P, *infra,* pp. A169-A171). Referral to the Commission of common-law damage action issues to be tried and decided in the curtailment proceedings will further delay the delineation of a permanent curtailment plan for United's system.

The Commission is understaffed and overworked.[8] The need to expeditiously resolve the issues in this lawsuit greatly outweighs any aid the FPC may be able to give the District Court.[9]

This case has now been pending for more than two years, and the curtailment proceedings for more than six years, but the Commission is still attempting to delineate a permanent curtailment plan for United. The evidentiary record in the curtailment proceedings (RP71-29 *et al* Phase II) was recently closed on December 2, 1976. The record contains 24,621 pages of testimony and 852 exhibits. Relatively short briefing schedules have been set by the Presiding Administrative Law Judge. Obviously

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8. The Chairman of the Commission in testifying before the Senate Committee on Government Operations on May 27, 1976 said that in January 1976 10,480 cases were pending before the Commission; that the number had grown to 11,426 cases at the end of February and to 14,454 cases at the end of March 1976. He testified that the Commission was able to decide about 62 cases per week or about 3,224 per year. He said the Commission was on a treadmill and rapidly going backward; that the "system is in serious danger of breaking down." Obviously, the Commission is already four or five years behind with its docket and getting further behind each month.

9. The Courts must always balance the benefits of seeking agency's aid with the need to resolve disputes fairly yet as expeditiously as possible. *Meat Cutters Union v. Jewel Tea Co.,* 381 U.S. 676, 686 (1965).

the damage suit issues cannot be tried in that proceeding. Trial of United's petition for a declaratory order (Phase III) has not commenced, but as pointed out earlier, supra, p. 6, p. 9 the Commission has declined to issue a declaratory order on three of the four issues raised by United (App. N, *infra,* pp. A154-A160), leaving only the exculpatory tariff questions for determination. The stay has not been kept within the bounds of moderation, and MP&L has been denied promptness of decision which in all judicial actions is one of the elements of justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MISSISSIPPI POWER & LIGHT COMPANY,
Plaintiff-Appellant
v.
UNITED GAS PIPELINE COMPANY
et al., Defendants-Appellees,

STATE OF MISSISSIPPI,
Plaintiff-Intervenor.

No. 75-2316.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

May 27, 1976

Utility brought action against pipeline company and its former parent for breach of contract. The United States District Court for the Southern District of Mississippi at Jackson, William Harold Cox, J., granted stay of all proceedings to await response of the Federal Power Commission as to its primary jurisdiction of curtailment question and utility appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that referral was appropriate inasmuch as FPC was presently resolving issues related to curtailment plans, FPC assistant would be of material aid to the District Court and the resolution of damage action and none of the factors mitigating applicability of the primary jurisdiction doctrine were present; and that District Court should have been more precise in its stay order by outlining with some specificity both the proceedings before the FPC that should be concluded before the damage litigation should continue and the issues upon which the FPC's opinion was sought.

Remanded with directions.

Appeal from the United States District Court for the Southern District of Mississippi.

Before THORNBERRY, COLEMAN and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

This appeal involves another facet of the problems created by the nationl energy shortage. Specifically, this litigation was commenced by Mississippi Power and Light Co. (MP&L) for breach of contract against one of the major natural gas pipeline companies, United Gas Pipeline (United) and its former parent, Pennzoil Co. Alleging failure to supply the amounts of gas provided by the contract and basing its action solely on state law, MP&L brought a diversity action against United and Pennzoil in the United States District Court for the Southern District of Mississippi. After filing their answers, United and Pennzoil asserted the primary jurisdiction of the Federal Power Commission. The district court granted a stay of all proceedings "to await the response of the Federal Power Commission as to its primary jurisdiction of this curtailment question. . . ."[1] MP&L appeals[2] the

1. The district court order states in relevant parts:

It is the opinion of this Court that under the Natural Gas Act that the Federal Power Commission probably has jurisdiction of this curtailment controversy, and that the Court at this time should defer to its decision as to the authority of the Commission in this controversy, which is in the process of being handled by that agency; and while the agency's decision is not final and binding on the court, it must be sought at this time.*

The motion of the defendants to dismiss will be denied. The motion to stay proceedings here to await response of the Federal Power Commission as to its primary jurisdiction of this curtailment question will be granted. In the meantime, all other and further processes of this Court will be stayed to await the ultimate answer of the Commission as to this paramount and controlling question of law.

* *Federal Power Commission v. Louisiana Power & Light Company, et al*, 406 U.S. 621, 92 S.Ct. 1827, 1842, [32 L.Ed. 2d 369] the Court among other things held: "In that circumstance, the District Court and the Court of Appeals were obliged to defer to the FPC for the initial determination of its jurisdiction. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938). The need to protect the primary authority of an agency to determine its own jurisdiction 'is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the [agency]. While the [agency's] decision is not the last word, it must assuredly be the first.'"

district court's order basically arguing that the Federal Power Commission does not have primary jurisdiction over any of the issues raised in this action. MP&L argues, moreover, that even if the FPC does have primary jurisdiction, the district court erred in not making its order more specific by stating which issues should be referred to the FPC. Finally, MP&L objects to the district court's stay of discovery. While we agree that the district court order should be more specific, we hold that the court was correct in staying the proceedings in order that the Federal Power Commission may exercise primary jurisdiction in this matter.

I. THE CURTAILMENT CONTROVERSY:

In order to more clearly understand the issues presented by this complex litigation, a review of the natural gas shortage controversy and the litigation accompanying it is helpful.[3]

2. This court granted leave to appeal from an interlocutory order on May 28, 1975.

3. *See*, e. g., *FPC v. Louisiana Power and Light Co.*, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972); *Louisiana Power and Light Co. v. FPC*, 526 F.2d 898 (5th Cir. 1976); *Fort Pierce Utility Authority of City of Fort Pierce v. FPC*, 526 F.2d 993 (5th Cir. 1976); *Mississippi Public Service Commission v. FPC*, 522 F.2d 1345 (5th Cir. 1975); *State of Louisiana v. FPC*, 503 F.2d 844 (5th

By the spring of 1971, several pipeline companies, including United, had notified the Federal Power Commission that their supplies were inadequate to meet commitments to their customers. United, as well as other pipeline companies, proposed to meet this shortage situation by instituting curtailment plans that would allocate the available gas among their customers. Most of these plans had been adopted by the pipelines during a temporary shortage created by the Korean war. Needless to say, these plans were often unsuitable as a method of curtailing supplies during the present period of continual and severe shortage. The FPC, in Order No. 431,[4] Statement of General Policy, ordered the pipelines to institute all necessary steps to alleviate the shortage and to submit new tariffs which would incorporate revised curtailment plans. Under United's temporary curtailment plan filed pursuant to Order 431, MP&L, a utility who used natural gas as a fuel to generate electricity, was placed in the category to be curtailed first.[5] Therefore, MP&L has been receiving substantially less natural gas than it had before curtailment.

The necessity for curtailment gave rise to two distinct problems. The first question was how much of the available supply of natural gas each of the pipeline's customers

Cir. 1974); *Atlanta Gas and Light Co. v. FPC*, 476 F.2d 142 (5th Cir. 1973); *International Paper Co. v. FPC*, 476 F.2d 121 (5th Cir. 1973).

4. 49 FPC 85 (1973).

5. Originally, MP&L was given a preference over other customers. The Commission, however, ordered that utilities like MP&L be placed in the lowest priority for gas supplies. While this court has remanded to the Commission for further evidence on this point, the court has allowed United to operate through the present heating season under a plan that denied MP&L any priority. *See Louisiana Power and Light Co. v. FPC*, 526 F.2d 898 (5th Cir. 1976).

would receive. The second question was who would bear the economic consequences of the shortage. Those customers who were curtailed in whole or in part would have to seek alternative sources of energy which would generally be available at significantly increased cost, and somehow this additional cost would have to be allocated. The various parties, therefore, sought to insure that others bore the financial burden of curtailment.

United feared liability on two separate theories. First, a curtailed customer might bring a general breach of contract action alleging failure to deliver the amounts of gas stated in the contract. Second, a customer could bring an action under a specific clause—the substitute fuel clause—contained in many of United's contracts, including its agreement with MP&L. That provision arguably requires United to compensate a customer for the additional cost of obtaining other types of fuel to meet the customer's energy needs. While United contended that the substitute fuel clause did not apply in a general curtailment situation and if it did the language of the clause limited liability to the amount of fuel purchased by the customer for only a few days, should these contentions fail, United faced a possibility of over a billion dollars in liability.

Even before suit was instituted, United sought by means of proceedings before the Federal Power Commission to insure that it would not bear the financial cost of curtailment. In 1970, United sought a declaratory order from the Commission which would hold that § 12.1 of its tariff on file with the Commission immunized United from liability.[6] That section provided that curtailment could

6. *See* United Gas Pipe Line Company, FPC Docket No. RP71-29. MP&L has contended from the beginning that no tariff provision can affect its agreements with United.

be instituted "without liability." United also sought to file with the Commission proposed § 12.3 of the tariff that stated in relevant part,

> . . . nor shall seller (United) be obligated to pay or credit such customers any sums with respect to substitute fuels burned by such customers during such a period of proration or interruption.

The Commission rejected United's proposal in Opinion 606[7] and stated that,

> implementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense for United against all claim for specific performance, damages, or other requests for relief under these contracts affected by curtailment that may be initiated in the courts.

In *International Paper Co. v. Federal Power Commission,* 476 F.2d 121 (5th Cir. 1973), however, this court vacated that statement in Opinion 606 as "mere dicta" totally lacking evidentiary support. *Id.* at p. 125.

Subsequently, United resubmitted § 12.3, but in Opinion 647-A[8] the Commission again rejected United's proposed exculpatory language. This time, the Commission reasoned that United would only be vulnerable under a general breach of contract theory if the curtailment had resulted from its own negligence, bad faith, or other wrongful conduct. The Commission had found, however, that United had not acted "improvidently" and that it would not therefore be held liable for damages. Next, the

7. 46 FPC 786 (1971); *See also,* Opinion Nos. 606-A, 46 FPC 1290 (1971).

8. 49 FPC 1211 (1973). *See also,* 49 FPC 179 (1973).

Commission stated that substitute fuel clauses required United at most to reimburse its customers the extra costs of substitute fuels for only "a maximum of seven days." Then, the Commission opined that if a court found that the clause created "open ended" liability, the FPC would be "compelled to find such clauses are unduly preferential." The Commission reasoned that the prospect of open ended liability might cause United to disobey FPC orders and in some way favor customers who had substitute fuel clauses in their contracts.

Once again, in *State of Louisiana v. Federal Power Commission,* 503 F.2d 844 (5th Cir. 1974), this court vacated the FPC's findings. The court pointed out that the proper determination of whether United was liable for breach of contract absent an exculpatory tariff such as § 12.3 would be decided by a court in the contract actions. Then, the court found the FPC's interpretation of the substitute fuel clauses to be an "assertion (which) cannot stand without supporting reasons." *Id.* at 868. Furthermore, the court instructed the FPC not to assume that United was not liable for breach of contract but to evaluate the proposed § 12.3 in light of possible contract liability. The court stated at page 867:

> We think the Commission should have determined what would happen with the proposed change in effect. Can a tariff provision remove general contractual liability? If the provision would remove liability, would the unavailability of damages subject United's curtailed customers to 'any undue prejudice or disadvantage?' In short, since the Commission cannot adjudicate contract liability, it should evaluate section 12.3 on the assumption that United faces possible liability—not on the assumption it is immune,

In *State of Louisiana,* the court also reversed the Commission's decision on various other aspects of United's curtailment plan. On remand, the FPC established procedures to meet the objections of this court.[9] Part of these procedures, delineated Phase III by the Commission, were specifically designed to determine the advisability of adopting § 12.3 as a part of United's tariff. At present, hearings are being conducted as a part of these Phase III proceedings.

United also filed with the Commission on March 3, 1975, a petition requesting a declaratory order. Under United's request, the Commission would determine, *inter alia,* (1) whether the availability of damages to some of United's curtailed customers would create an undue preference in violation of the Natural Gas Act, (2) whether § 12.1 of United's tariff would preclude liability to certain customers such as MP&L and (3) whether the shortage was caused by the negligence or willful misconduct of United. The Commission has not clearly articulated what, if any, its action will be on United's petition.[10]

On August 5, 1974, Mississippi Public Service Commission (MPSC) filed a petition for extraordinary relief before the Commission on behalf of MP&L and other Mississippi utilities. In this petition, the utilities sought

9. Order on Remand Denying Motion for Immediate Modification of Curtailment Plan, United Gas Pipe Line Company, FPC Docket Nos. RP71-29 and RP71-120, March 7, 1975 on rehearing May 2, 1975.

10. *See* Order partially granting petition for declaratory order and motion to consolidate, United Gas Pipe Line Company, (Phase III) FPC Docket Nos. RP71-29, RP75-71, RP75-69, August 20, 1975; Supplemental Order modifying order issued December 9, 1975 and referring ruling to Commission for review, United Gas Pipe Line Company, (Phase III) FPC Docket Nos. RP71-29, RP75-69 and RP75-71, December 16, 1975.

compensation from those customers of United who received a higher preference for gas. Under their proposal, a customer who received full gas supplies would have to make payments to customers of United who had been curtailed. In this way, the utilities sought to allocate among all the customers of United the burden of curtailment. The Commission denied MPSC's petition on the ground that it was without jurisdiction to require such compensation. This court in *Mississippi Public Service Commission v. Federal Power Commission,* 522 F.2d 1345 (5th Cir. 1975), rejected the Commission's jurisdictional argument and remanded for determination of whether compensation payments should be a condition for receipt of a higher priority in a gas curtailment plan.

On August 30, 1974, MP&L brought this present action against United and its former parent Pennzoil. As has been outlined above, MP&L sought damages of approximately $160,000,000 from United for breach of contract. The district court stayed these proceedings pending the exercise of primary jurisdiction by the Federal Power Commission, and MP&L objects to that stay.

II. PRIMARY JURISDICTION:

[1] The doctrine of primary jurisdiction has evolved as a means of reconciling the functions of administrative agencies with the judicial function of the courts.[11] When

11. *See* generally, Travis, Primary Jurisdiction, A General Theory and Its Application to the Securities Exchange Act, 63 Calif. L. Rev. 926 (1975); Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037 (1964); *Handler Regulation v. Competition,* 44 U. Conn. L. Rev. 191 (1975); King, The "Arguably Lawful" Test of Primary Jurisdiction in Antitrust Litigation Involving Regulated Industries, 40 Tenn. L. Rev. 617 (1973); Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163 (1974); Note, Primary Jurisdiction in Antitrust Cases. Three recent decisions, 42 U. Cinn. L. Rev. 725 (1973).

legal disputes develop that directly affect an industry subject to regulation, the need arises to integrate the regulatory agency into the judicial decision making process. One method to accomplish integration is to have the agency pass in the first instance on those issues that are within its competence. In short, the agency should have the first word. *Marine Engineers Beneficial Assn. v. Interlake Steamship Co.*, 370 U.S. 173, 185, 82 S.Ct. 1237, 1243, 8 L.Ed.2d 418, 426 (1962).

Reference to administrative agencies was first established in those cases where Congress by statutory provision had allocated to the agency the power to conclusively decide the contested issue. For example, the Interstate Commerce Commission is the exclusive agency for determining the reasonableness of rates; therefore, a court must defer to that agency when a party challenges a rate in a legal proceeding. *Texas and P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907). Under this methodology, before invoking the doctrine of primary jurisdiction it was imperative that the court determine whether the agency's decision would be definitive. There was the implication that if the agency's conclusion did not finally resolve the issue, reference would not be warranted. *Public Utilities Commission v. United States*, 355 U.S. 534, 539, 78 S.Ct. 446, 450, 2 L.Ed.2d 470, 475 (1958); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254, 71 S.Ct. 692, 696, 95 L.Ed. 912, 920 (1951).

Applying the doctrine of primary jurisdiction only in those situations where the issue was solely within the agency's competence created difficulties in integrating the administrative agency's position with the judicial process. First, the court would have to determine, often on the

barest of pleadings and in the most complicated litigation, to which decision making body—the court or the agency—Congress had allocated the resolution of the issue. Administrative jurisdiction, however, is difficult to determine without some factual underpinnings and often depends upon the particular context in which the issue arises. *Cf. Federal Power Commission v. Louisiana Power and Light*, 406 U.S. 621, 647, 92 S.Ct. 1827, 1841, 32 L.Ed.2d 369, 388 (1972). This difficulty in determining jurisdiction is particularly acute where the agency, such as the Federal Power Commission, has only a limited grant of jurisdiction from Congress. Compare *Federal Power Commission v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 69 S.Ct. 1251, 93 L.Ed. 1499 (1949), with *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 85 S.Ct. 1517, 14 L.Ed.2d 466 (1965). Secondly, such limited invocation of the doctrine of primary jurisdiction would emasculate the agency's ability to participate in those cases where a final decision was left to the courts even though the litigation had a profound impact on the regulatory process. Therefore, the courts have often required the prior resort to an administrative agency before allowing the litigation to proceed.[12]

Recently, the Supreme Court has required reference to the relevant regulatory agency without even deciding whether that agency has jurisdiction to finally determine the basic dispute in the case. In *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973), the Court dealt with an antitrust complaint attacking a commodity exchange's decision to transfer a membership of the exchange. The defendant had sought

12. Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 174-179 (1974).

reference to the Commodity Exchange Commission, but there was considerable dispute over whether the Commission had jurisdiction to resolve the contested issues. The Supreme Court stated at page 304, 93 S.Ct. at page 582, 34 L.Ed.2d at page 537:

> We need not finally decide the jurisdictional issue for present purposes, but there is sufficient statutory support for administrative authority in this area that the agency should at least be requested to institute proceedings.

The Court then went on to state that it was "very likely that a prior agency adjudication of this dispute will be *a material aid* in ultimately deciding" the issue. *Id.* at 305, 93 S.Ct. at 582, 34 L.Ed.2d at 537.

Even before *Ricci,* this court had mandated referral to the Federal Communication Commission even though that agency decision might not have been "the end to the matter." *Carter v. American Tel. & Tel. Co.,* 365 F.2d 486, 499 (5th Cir. 1966). In *Carter,* we required that the doctrine of primary jurisdiction be invoked where there was only a "strong possibility" that the FCC decision would resolve the dispute. *Id* at 497. *See also, Southern Railway Co. v. Combs,* 484 F.2d 145 (6th Cir. 1973). Also, this court had referred to the very agency involved in this litigation, the Federal Power Commission, the issue of whether a particular dispute was encompassed by that agency's jurisdictional grant. *J. M. Huber Corp. v. Denman,* 367 F.2d 104 (5th Cir.. 1966); *see also, Agricultural Trans. Assoc. of Texas v. King,* 349 F.2d 873 (5th Cir. 1965); *Louisville and Nashville Railroad v. Knox Home,* 343 F.2d 887 (5th Cir. 1965). *See also,*

Monsanto Co. v. Federal Power Commission, 146 U.S. App.D.C. 396, 463 F.2d 799 (1972).

[2] A court's discretion to seek the administrative agency's input in those cases where the agency will be a "material aid" to the ultimate decision is not unlimited. In this period of expanding federal regulation, there are few disputes in which reference to some federal or state agency might not conceivably be of material aid to the court.[13] As the Supreme Court stated in *United States v. Western Pacific Railroad Co.,* 352 U.S. 49, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956),

> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

See also, Watts v. Missouri-Kansas-Texas Railroad Co., 383 F.2d 571, 581 (5th Cir. 1967); *CAB v. Modern Air Transp. Inc.,* 179 F.2d 622, 625 (2d Cir. 1950).

[3-10] The courts should be reluctant to invoke the doctrine of primary jurisdiction, which often, but not always, results in added expense and delay to the litigants where the nature of the action deems the application of the doctrine inappropriate. While one cannot easily reconcile all the cases wherein referral was denied, there was a few general situations in which referral is often unwarranted. If, under no conceivable set of facts, the agency could immunize what would be a clear violation of fed-

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13. King, The "Arguably Lawful" Test of Primary Jurisdiction in Antitrust Litigation Involving Regulated Industries, 40 Tenn. L. Rev. 617, 657 (1974).

eral law, referral would be inappropriate. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 78 S. Ct. 851, 2 L.Ed.2d 926 (1958). In implementing the national policy of free competition as embodied in the antitrust laws, the court normally should not defer where the issue is not dissimilar from that encountered in nonregulated industries. *See United States v. Philadelphia National Bank*, 374 U.S. 321, 339, 83 S.Ct. 1715, 1728, 10 L.Ed. 2d 915, 930 (1963); *California v. Federal Power Commission*, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962). Deference is particularly inappropriate where the litigation deals with a single event which requires no continuing supervision by the regulatory agency. *Cf. Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973). The nature of relief sought, moreover, is also relevant consideration in deciding whether to refer to the agency. The court in instituting injunctive relief may be able to provide adequate flexibility to coordinate its decision with subsequent regulatory action. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). In addition, in those cases where Congress has determined by statute that the courts should decide the issue in the first instance, primary jurisdiction should not be invoked. *Mercury Motor Express v. Brinke*, 475 F.2d 1086 (5th Cir. 1973). Likewise, when the agency's position is sufficiently clear or nontechnical or when the issue is peripheral to the main litigation, courts should be very reluctant to refer. *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 941 (1922); *Shew v. Southland Co.*, 370 F.2d 376 (5th Cir. 1966); *Strickland Transportation Co. v. United States*, 334 F.2d 172 (5th Cir. 1964). Finally, the court must

always balance the benefits of seeking the agency's aid with the need to resolve disputes fairly yet as expeditiously as possible. *Cf. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686, 85 S.Ct. 1596, 1600, 14 L.Ed.2d 640, 647 (1965); *Foremost International Tours v. Quantas Airways Ltd.*, 525 F.2d 281 (9th Cir. 1975), petition for cert. filed, 44 L.W. 3533 (March 23, 1976).

III. THE PRESENT LITIGATION:

[11, 12] In this litigation, referral is particularly appropriate. While the Federal Power Commission's jurisdiction is somewhat limited, the Natural Gas Act, as interpreted by the Courts, has provided the Commission with the statutory basis for pervasive regulation of the curtailment question. *See Louisiana Power and Light v. Federal Power Commission, supra; see also Fort Pierce Utility Authority v. Federal Power Commission*, 526 F. 2d 993 (5th Cir. 1976); *Consolidated Edison Co. v. Federal Power Commission*, 168 U.S.App.D.C. 92, 512 F.2d 1332, modified, 171 U.S.App.D.C. 55, 518 F.2d 448 (1975). The Commission is presently involved in resolving issues which have a direct impact on civil litigation involving curtailment plans. The advisability of invoking primary jurisdiction is greatest when the issue is already before the agency. *Louisiana Power and Light v. Federal Power Commission, supra*, at 910; *Industrial Communications System Inc. v. Pacific Tel. & Tel. Co.*, 505 F.2d 152, 157 (9th Cir. 1974); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 496 F.2d 214, 223-24 (3rd Cir. 1974). The Commission, moreover, is reviewing in some detail the facts and circumstances that resulted in the present shortage in order to determine what is a fair,

equitable, permanent curtailment plan. Indeed, this court has already stated in a similar action that referral to the FPC is preferred. *Atlanta Gas and Light Co. v. Federal Power Commission*, 476 F.2d 142, 151 (5th Cir. 1973).

[13, 14] There also can be no doubt that the Commission's informed opinion will be of material aid to the district court in the resolution of the damage action. In five specific components of the dispute the Commission's assistance would be significant. First, the Commission can determine in detail the facts and circumstances that resulted in the severe shortage United is experiencing. Development of the factual context by those expert in the area, is an established basis for primary jurisdiction. *Far East Conference v. United States,* 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952). Second, the Commission could determine whether to accept an exculpatory tariff from United such as proposed § 12.3. In reaching this decision, the Commission could also determine whether a tariff provision can immunize United from liability and particularly whether such a tariff would provide United with a defense in this suit by MP&L. Certainly, the interpretation and implementation of a tariff is a question properly passed upon in the first instance by the Commission, and reference by a court to a regulatory agency may not even be discretionary on such an issue. *Interstate Commerce Commission v. Atlantic C.L.R. Co.,* 383 U.S. 576, 600-601, 86 S.Ct. 1000, 1014-1015, 16 L.Ed.2d 109, 126 (1966); *United States v. Western P. R. Co.,* 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956); *Watts v. Missouri-Kansas-Texas Railroad Co., supra.* Third, the Commission's interpretation of the United-MP&L contract provisions that might possibly limit damages would aid a court in the ultimate decision. *See, J. M. Huber Co. v. Denman, supra.* Fourth, the Commission is presently reviewing a request by MP&L for compensation from the customers of United who receive higher priorities. In that proceeding, MP&L seeks payment for some of the very damages which it claims in this damage action. Finally, the Commission could clearly articulate whether in its view the presence or absence of damages significantly affects the allocation decision. While the Commission has at times stated that it believes such an impact is evident, *see, State of Louisiana v. Federal Power Commission, supra,* referral of this damage action would give the Commission an opportunity to articulate its rationale and support it with relevant findings of fact. In short, there are several aspects of the damage action that the Commission decisions may either resolve for or, at a minimum, be of material assistance to the trial court. *See, Ricci v. Chicago Mercantile Exchange, supra; Carter v. American Tel. & Tel. Co., supra.*

None of the factors mitigating the applicability of the primary jurisdiction doctrine are present. First, the curtailment question is extremely complicated, affecting energy policy throughout the entire nation. For a court to attempt to determine whether it or the FPC has final authority over all aspects of the damage action on the record, before the district court would be singularly unwise. Second, here there are circumstances such as the addition of § 12.3 to United's tariff that might immunize United from liability. Third, no federal policy or statute entrusts the decision to courts in the first instance. Certainly, these curtailment damage actions are vastly dissimilar to the bulk of federal diversity contract litigation. Finally, the FPC has stated that damage actions could disrupt its resolution of the curtailment problem—a problem

which all parties agree is likely to be a continual difficulty for quite some time. In balance, we believe that the Commission's assistance will be of "sufficient aid to the court that the action should not go forward without making reasonable efforts" to obtain the FPC's assistance. *Chicago Mercantile Exchange v. Deaktor,* 414 U.S. 113, 115, 94 S.Ct. 466, 467, 38 L.Ed.2d 344, 347 (1973).

MP&L's reliance on our opinions in *International Paper, supra,* and *State of Louisiana, supra,* for the proposition that no issue in this case is subject to the primary jurisdiction of the FPC is misplaced. There the court dealt with the Commission's refusal to institute United's proposed exculpatory tariff. The Commission, acting upon an inadequate evidentiary basis, had concluded that such a tariff was unnecessary because United was immune from damages. We vacated such statements by the Commission because they lacked evidentiary support. We also stated that the contractural liability of United, absent an exculpatory tariff, should be finally determined in a court of law. Nothing we said in either case, however, implied that although a court will make the final determination, that court could not and should not seek the Commission's assistance pursuant to the doctrine of primary jurisdiction before resolving the litigation.

[15] While we agree that the district court properly stayed proceedings pending the decision of the Federal Power Commission, we believe the district court should have been more precise in its order. The district court simply stayed all proceedings pending future action by the Federal Power Commission. In its present posture, the United proceedings before the Commission could terminate with several of the issues that might be relevant to the damage action still unresolved. For example, the

Commission might determine that an exculpatory provision such as proposed § 12.3 could not immunize United from liability and terminate all proceedings concerning the damage question. In such a situation, it would be even more important for the Commission to state its interpretation of United's contract provisions. In addition, the Commission is presently resolving the issues concerning the facts underlying United's shortage in proceedings intended to develop a permanent curtailment plan. We believe it would be beneficial for the Commission to address the issue of contract liability in a proceeding where the damage action was clearly before it. Reference by the district court of an order to the Commission which specifically outlines those issues in which the courts seeks assistance would provide the Commission with a context to focus on the damage action. Part of the difficulty that has resulted in the United litigation has been the tendency of the Commission, in almost an aside, to resolve the question of United contract liability while its focus has been primarily on developing a curtailment plan. On remand, the district court should prepare an order which outlines with some specificity both the proceedings before the Commission that should be concluded before the damage litigation should continue and the issues upon which the Commission's opinion is sought.[14] *See, International Ass'n, Etc. v. United Contractors, Etc.,* 483 F.2d 384, 400-401, 404, modified 494 F.2d 1353 (3rd Cir. 1974).

[16] In its final contention, MP&L argues that the district court erred in not allowing discovery to continue

14. By requiring the district court to prepare an order in which certain issues are referred to the FPC, we do not intend to unduly restrict that agency's ability to assist the district court. The agency is free to make all findings that it believes will aid the prompt resolution of the dispute.

and proceeding to trial on those issues which were not referred to the Commission. While the district court has an affirmative obligation to resolve those issues in the litigation which, if they are sufficiently distinct, are not referred to the Commission, *Louisville and Nashville Railroad Co. v. Knox Homes Corp., supra* at 895 (5th Cir. 1965), in a suit such as this one where referral encompasses the major part of the litigation the district court has discretion to stay all proceedings.[15] *Chronicle Publishing Co. v. NBC,* 294 F.2d 744, 749 (9th Cir. 1961).

Finally, we add a note of caution. We have been careful not to articulate the exact effect of the findings of the Commission upon the subsequent litigation. The district court stated in its order that the Commission's decision would not be binding upon the court. We believe that it is singularly inappropriate to determine at this point in this complex litigation what the effect of the Commission's decisions will be before the nature and extent of the Commission's action is ascertainable. While, as we have stated before, the court will finally determine United's liability in the damage action, we express no opinion as to the degree to which the trial court in reaching its decision will be bound by prior agency determination. Once the Commission decides the issues referred to it by the district court, there will be adequate time to determine the proper procedures for reviewing such findings and their

15. According to United's brief, discovery is proceeding in various other similar actions brought against United in federal and state courts. Nothing we say here is meant to deny the district court the power to allow discovery if after preparing a new order the court believes that allowing discovery will aid in the resolution of the dispute.

effect on the subsequent litigation. *Cf. Carter v. American Tel. & Tel. Co., supra* at 499-500.

In conclusion, we believe the district court acted properly in staying the procedures and in referring the case to the Federal Power Commission so that that agency might exercise primary jurisdiction. We also believe that the district court should have been more precise in its order staying the litigation. We therefore remand to the district court for the limited purpose of modifying its order.

Remanded with directions.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-8134

(Filed May 28, 1975)

MISSISSIPPI POWER & LIGHT COMPANY, and
STATE OF MISSISSIPPI, Petitioners,

versus

UNITED GAS PIPE LINE COMPANY and
PENNZOIL COMPANY, Respondents.

On Application for Leave to Appeal from an
Interlocutory Order

Before THORNBERRY, MORGAN and RONEY Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Southern District of Mississippi entered on April 4, 1975, is

GRANTED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1975

No. 75-2316

D. C. Docket No. CA-J74-185(C)

MISSISSIPPI POWER & LIGHT COMPANY,
Plaintiff-Appellant,

versus

UNITED GAS PIPE LINE COMPANY, ET AL.,
Defendants-Appellees,

STATE OF MISSISSIPPI,
Plaintiff-Intervenor.

Appeal from the United States District Court for the
Southern District of Mississippi

Before THORNBERRY, COLEMAN and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

May 27, 1976

Issued as Mandate:

APPENDIX D

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

September 27, 1976

(Received October 1, 1976)

TO ALL COUNSEL OF RECORD

No. 75-2316—Mississippi Power & Light Co. vs. United Gas Pipe Line Co., et al.; State of Mississippi

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ CLARE S. SACHS
Deputy Clerk

cc: Messrs. Sherwood W. Wise
Joseph P. Wise
Mr. Clayton L. Orn
Messrs. W. DeVier Pierson
Peter J. Levin
Mr. E. L. Brunini
Mr. Alvin M. Owsley, Jr.
Mr. Joe H. Daniel
Messrs. Giles W. Bryant
Marshall G. Bennett

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J74-185(C)

(Filed April 4, 1975)

(Received April 8, 1975)

MISSISSIPPI POWER & LIGHT COMPANY, Plaintiff
and
STATE OF MISSISSIPPI, Plaintiff-Intervenor

vs.

UNITED GAS PIPE LINE COMPANY and
PENNZOIL COMPANY, Defendants

ORDER

This cause having come on for hearing on the separate motions of the defendants to dismiss this civil action, or, in the alternative, to stay this civil action until further order of the Court, and the Court with the consent of all parties having retained jurisdiction of said motions for the purpose of ruling thereon, and the Court having received oral and documentary evidence, having received the briefs of the parties, having heard the argument of

counsel, and being fully advised in the premises, is of the opinion that the motions to dismiss should be denied and that the motions to stay should be granted for the reasons set forth in the Court's April 2, 1975, opinion.

It is, therefore, ordered and adjudged that the separate motions of the defendants to dismiss this civil action should be and the same are hereby denied.

It is further ordered and adjudged that the separate motions of the defendants to stay these proceedings should be and the same are hereby granted, and it is further ordered and adjudged that all other and further processes of this Court will be and they are hereby stayed until further order of the Court.

IT IS SO ORDERED AND ADJUDGED, this the 4th day of April, 1975.

/s/ HAROLD COX
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION J74-185(C)

(Received April 3, 1975)

MISSISSIPPI POWER & LIGHT COMPANY, Plaintiff

v.

UNITED GAS PIPE LINE COMPANY and
PENNZOIL COMPANY, Defendants

The plaintiff instituted this diversity suit to recover damages for the alleged breach of a contract to supply it with natural gas. This is basically an action to recover actual damages for the alleged breach of a contract to sell and deliver to the plaintiff natural gas for its use and consumption.

The defendants have answered and both contend in effect that they have no liability for the present allotments of natural gas which are supplied under curtailment orders of the Federal Power Commission, and in strict compliance with its mandate. The plaintiff contends that this action is one at common law for damages and was and is occasioned and necessitated by misfeasance of the defendants in that the defendants knowingly and deliberately

oversold its supply of natural gas well knowing and understanding the ultimate effect to be that it lacked sufficient natural gas to comply with their contract requirements and obligations.

The defendants first seek a dismissal of this suit for lack of jurisdiction, or alternatively, for a stay of this proceeding to await a decision by the Federal Power Commission as to its primary jurisdiction or not of this controversy. A detailed discussion of the myriad orders and opinions of the Commission in its exercise of primary jurisdiction is not necessary or helpful to a disposition of the motions here.

It is the opinion of this Court that under the Natural Gas Act that the Federal Power Commission probably has jurisdiction of this curtailment controversy, and that the Court at this time should defer to its decision as to the authority of the Commission in this controversy, which is in the process of being handled by that agency; and while the agency's decision is not final and binding on the Court, it must be sought at this time.[1]

The motion of the defendants to dismiss will be denied. The motion to stay proceedings here to await response of the Federal Power Commission as to its primary juris-

1. *Federal Power Commission v. Louisiana Power & Light Company, et al*, 406 U.S. 621, 92 S.Ct. 1827, 1842, the Court among other things held: "In that circumstance, the District Court and the Court of Appeals were obliged to defer to the FPC for the initial determination of its jurisdiction. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938). The need to protect the primary authority of an agency to determine its own jurisdiction 'is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the [agency]. While the [agency's] decision is not the last word, it must assuredly be the first.'"

diction of this curtailment question will be granted. In the meantime, all other and further processes of this Court will be stayed to await the ultimate answer of the Commission as to this paramount and controlling question of law.

The defendants may present an appropriate order to the Court consistent with such views within five days after this date.

April 2, 1975

/s/ HAROLD COX
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J74-185(C)

JURY TRIAL REQUESTED

(Filed August 30, 1974)

MISSISSIPPI POWER & LIGHT COMPANY, Plaintiff

v.

UNITED GAS PIPE LINE COMANY and
PENNZOIL COMPANY, Defendants

COMPLAINT

1. The Plaintiff, Mississippi Power & Light Company (MP&L), is a corporation incorporated under the laws of the State of Mississippi having its principal place of business in the State of Mississippi; Defendant, United Gas Pipe Line Company (United), is a corporation incorporated under the laws of the State of Delaware having its principal place of business in a state other than the State of Mississippi; and Defendant, Pennzoil Company (Pennzoil), is a corporation incorporated under the laws of the State of Delaware having its principal place of

business in a state other than the State of Mississippi. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. MP&L is engaged in generating, transmitting and distributing electricity, principally in the western half of the State of Mississippi where it serves approximately 273,000 retail customers and 62 wholesale customers. The Defendant United is engaged in transporting and selling natural gas. MP&L has purchased natural gas for use as a boiler fuel at its Rex Brown Steam Electric Station in Jackson, Mississippi, and its Baxter Wilson Steam Electric Station in Vicksburg, Mississippi, from United as hereinafter appears. The Defendant Pennzoil was, at all relevant times, the parent corporation of United and was in control of United and directed its activities in United's dealings with MP&L.

3. On or about December 8, 1967, United and MP&L entered into a contract denominated a "Gas Sales Agreement" a copy of which is attached hereto as Exhibit "A" and made a part hereof. The Gas Sales Agreement was subsequently amended by United and MP&L as follows:

(a) by a Letter Agreement dated December 8, 1967, a copy of which is attached hereto as Exhibit "B";

(b) by an Amendatory Agreement dated January 15, 1969, a copy of which is attached hereto as Exhibit "C";

(c) by an Amendatory Agreement dated April 29, 1969, a copy of which is attached hereto as Exhibit "D";

(d) by a Letter Agreement dated June 19, 1969, a copy of which is attached hereto as Exhibit "E";

(e) by an Amendatory Agreement dated March 12, 1970, a copy of which is attached hereto as Exhibit "F"; and

(f) by a Letter Agreement dated March 12, 1970, a copy of which is attached hereto as Exhibit "G".

The Gas Sales Agreement, as amended, imposes upon United the firm obligation to deliver up to 190,000 Mcf of gas to MP&L each day for use as boiler fuel at its Rex Brown and Baxter Wilson Steam Electric Stations referred to above. MP&L may receive the entire maximum daily delivery obligation of 190,000 Mcf at its Baxter Wilson Steam Electric Station, or it may elect to take up to 80,000 Mcf per day at its Rex Brown Steam Electric Station, so long as the aggregate at both stations does not exceed the maximum daily obligation of 190,000 Mcf.

COUNT ONE

4. In negotiating the Gas Sales Agreement of December 8, 1967, and the amendments thereto, United represented to MP&L that it had the ability to perform its obligations pursuant to such Agreement. As a consequence, MP&L, in reliance upon the Gas Sales Agreement and United's representations, expended substantial sums in constructing and maintaining power plant facilities designed to burn natural gas as a primary boiler fuel. United has breached the Gas Sales Agreement of December 8, 1967, as amended, and failed to furnish MP&L with all of the gas which it is obligated to furnish to MP&L pursuant to said Agreement. As a result of the breach of

said Agreement and as a result of United's misrepresentation to MP&L of its abilities to perform said Agreement, MP&L has been, or will be, damaged in an amount in excess of $67,750,000 in converting its power plant facilities so as to enable them to use fuel oil as a primary boiler fuel, for all of which United is indebted to MP&L because of the breach of the Gas Sales Agreement and United's misrepresentation of its abilities to perform its obligations.

COUNT TWO

5. As a further result of the breach of the Gas Sales Agreement of December 8, 1967, as amended, and as a result of United's misrepresentation to MP&L of its abilities to perform said Agreement, MP&L has been damaged by the loss of capacity of its power plant facilities designed to use natural gas. In order to restore its lost capacity, MP&L has installed replacement capacity at a cost of $42,450,000 for which United is indebted to MP&L because of the breach of the Gas Sales Agreement and United's misrepresentations of its abilities to perform its obligations.

COUNT THREE

6. In the Gas Sales Agreement of December 8, 1967, as amended (more particularly Article XVI of said Agreement), United agreed that it would reimburse MP&L the difference in cost between natural gas sold by United pursuant to the Gas Sales Agreement and fuel oil which MP&L would use as a substitute fuel for natural gas when requested by United or under certain other conditions. United agreed that it would reimburse MP&L for the use

of such substitute fuel for any period in which substitute fuel was used by MP&L not exceeding seven (7) days. United has refused and continues to refuse to perform its obligations to reimburse MP&L for the use of substitute fuel and has breached the Gas Sales Agreement to that extent. Consequently, United is indebted to MP&L for such breach in the amount of $6,250,000 down through July 31, 1974, and for additional sums which have been or may be accrued subsequent to such date, which amount MP&L seeks to recover to refund to its customers.

COUNT FOUR

7. As a consequence of its misrepresentations of its ability to perform and of its breach of the Gas Sales Agreement dated December 8, 1967, as amended, United has failed to supply MP&L with all of the gas that it required for its operations and which MP&L was entitled to expect to receive from United. In addition to fuel oil, for which MP&L is entitled to reimbursement pursuant to the substitute fuel clause referred to in paragraph 6 above, MP&L has been and continues to be required to purchase power and additionl fuel oil as a result of United's breach of contract and misrepresentation, and has been damaged by United's breach and misrepresentation, to the extent of $43,750,000 down through July 31, 1974, and for additional sums which have been or may be accrued subsequent to such date, which amount MP&L seeks to recover to refund to its customers.

COUNT FIVE

8. At all times relevant hereto, Pennzoil was the parent corporation of United and knew, or should have known, of the Gas Sales Agreement between United and

MP&L. Pennzoil has directed and controlled the activities of United for the sole profit and benefit of Pennzoil, without regard to the contractual obligations of United. Pennzoil, with the intention of reducing or discontinuing United's sales of natural gas to MP&L pursuant to the Agreement, interfered with MP&L's contractual rights with United, which interference was a proximate cause of MP&L's damages described above, all of which is here incorporated by reference. Pennzoil is therefore liable for the damages which MP&L has experienced or will experience as a result of United's breach of contract and misrepresentations.

COUNT SIX

9. In the alternative, at all times relevant hereto, Pennzoil was the parent corporation of United, and Pennzoil and United conspired with each other, with the intention of reducing or discontinuing United's sales of natural gas to MP&L pursuant to the Agreement, for United to breach the Gas Sales Agreement in the manner described above, all of which is here incorporated by reference. By reason thereof, Pennzoil and United are jointly and severally liable for the damages which MP&L has experienced or will experience as a result of United's breach of contract and misrepresentation.

WHEREFORE, Plaintiff demands judgment in the amount of $160,200,000 and other relief against the Defendants as follows:

(a) for the cost of converting its facilities so as to enable such facilities to use fuel oil as an exclusive fuel, in the amount of $67,750,000, and such other amounts as MP&L may be entitled to receive;

(b) for damage for loss of capacity in its Generating Plants in the amount of $42,450,000 and such other amounts as MP&L may be entitled to receive;

(c) for reimbursement for the use of substitute fuel as provided in the Gas Sales Agreement of December 8, 1967, as amended, in the amount of $6,250,000 through July 31, 1974, and for such other amounts as MP&L may be entitled to receive, and for a declaration of rights that MP&L is entitled to continue to receive reimbursement from Defendants pursuant to the substitute fuel clause for the first seven days of any period in which MP&L is required to use a substitute fuel for the remaining period of time covered by the Gas Sales Agreement of December 8, 1967, as amended, and

(d) for power and fuel oil in the amount of $43,750,000, which MP&L has been required to purchase down through July 31, 1974, and for such other amounts as MP&L may be entitled to receive, and a declaration of MP&L's rights that it is entitled to continue to receive an amount from Defendants as damages for United's continuing breach of the Gas Sales Agreement of December 8, 1967, as amended, for the remaining period of time covered by said Agreement,

together with interest and all costs of this action and all other relief to which the Plaintiff is entitled.

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EXHIBIT "A"

GAS SALES AGREEMENT

Between

UNITED GAS PIPE LINE COMPANY

and

MISSISSIPPI POWER & LIGHT COMPANY

Dated 12-8-67

United Gas Pipe Line Company

CONTENTS

EXHIBITS

THIS AGREEMENT made and entered into this Eighth day of December 1967, by and between UNITED GAS PIPE LINE COMPANY, a Delaware corporation, hereinafter called "Seller", and MISSISSIPPI POWER & LIGHT COMPANY, a Mississippi corporation, hereinafter called "Buyer";

WITNESSETH:

WHEREAS, under the terms of that certain agreement dated June 14, 1963, as amended, Seller is selling and delivering to Buyer and Buyer is purchasing and receiving from Seller natural gas for all of the fuel requirements of Buyer's Rex Brown Power Plant located at Jackson, in Hinds County, Mississippi and Buyer's Baxter Wilson Power Plant located near Vicksburg, in Warren County, Mississippi;

WHEREAS, Buyer has notified Seller that it proposes to construct an additional generating unit at Buyer's Baxter Wilson Power Plant, which unit will have a nameplate rating of 750,000 KW;

WHEREAS, Buyer has notified Seller that it will require substantial additional quantities of gas in the operation of said unit which is to be placed in operation approximately October 1, 1971, and desires to purchase such gas from Seller;

WHEREAS, Seller is agreeable to providing such greater quantities of natural gas for Buyer's said increased requirements; and,

WHEREAS, Seller and Buyer desire to terminate the above mentioned agreement as hereinabove mentioned and to enter into the within agreement;

NOW, THEREFORE, in consideration of the mutual covenants and obligations herein contained and assumed by each party, the parties hereto covenant and agree as follows:

I.

DEFINITIONS

The following terms, when used in this agreement, shall have the following meaning;

1. The term "day" shall mean a period of 24 consecutive hours beginning as nearly as is practicable at 7:00 a.m. or at such other time as may be mutually agreed to by Buyer and Seller.
2. The term "billing month" shall mean the calendar month.
3. The term "cubic foot of gas", for the purpose of measurement of the gas delivered and for all other purposes, unless otherwise specifically provided, is the amount of gas necessary to fill a cubic foot of space when the gas is at an absolute pressure of fourteen and nine-tenths (14.9) pounds per square inch and at a base temperature of sixty (60) degrees Farenheit.
4. The term "Mcf" which is the sales unit hereunder, shall mean one thousand (1,000) cubic feet of gas.
5. The term "Maximum Daily Delivery Obligation" shall mean the maximum volume of gas deliverable by Seller to Buyer hereunder in any one day.

II.

QUALITY

The gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that Seller may extract or permit the extraction of any of the

constituents of said natural gas; provided that Seller shall not subject said gas nor permit said gas to be subjected to any treatment in the extraction of any of the constituents of said gas which shall substantially change the chemical composition of any of the component parts of said gas. Seller is to tender delivery to Buyer of natural gas which is of merchantable quality only and reasonably free from water and other objectionable liquids, reasonably free from sand and other objectionable solids and which contains not more than forty (40) grains of sulphur or twenty (20) grains of hydrogen sulphide per thousand (1,000) cubic feet.

III.

MEASUREMENT

1. Assumed Atmospheric Pressure—The average atmospheric pressure shall be assumed to be fourteen and sevent-tenths (14.7) pounds per square inch, irrespective of actual elevation or location of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

2. Orifice Meters—When orifice meters are used for the measurement of gas, the computations of the volumes of gas measured shall be made in accordance with the following sub-sections (a) to (h) inclusive:

   (a) The orifice coefficient for each meter shall be calculated at the base pressure and base temperature set forth in Section 3 of Article I hereof, at a flowing temperature of sixty (60) degrees Farenheit and for gas of six hundred thousanths (.600) specific gravity.

   (b) The temperature of the gas shall be determined by a recording thermometer so installed that it may record the temperature of the gas flowing through the meter or meters. The average of the record obtained shall be deemed to be the gas temperature for the period under consideration, and the orifice coefficient as calculated in (a) above shall be corrected for each degree variation in the average temperature from sixty (60) degrees Farenheit.

   (c) The specific gravity of the gas shall be determined by a recording gravitometer so installed that it may record the specific gravity of the gas flowing through the meter or meters; provided, however, if Seller does not consider the installation of such recording gravitometer necessary, Seller shall make spot tests with an Edwards or other standard type specific gravity balance. If the recording gravitometer is used, the average of the record obtained shall be deemed to be the specific gravity of the gas for the period under consideration and the orifice coefficient as calculated in sub-section (a) above shall be corrected for each one-thousandth (.001) variation from six hundred thousandths (.600). If the spot test method is used, the specific gravity of the gas delivered hereunder shall be determined once monthly on a day as near the first (1st) of the billing month as is practicable, or as much oftener as is found necessary in practice. The result obtained from the test made on or near the first (1st) of the billing month shall be deemed to be the specific gravity of the gas during that billing month and

the orifice coefficient as calculated in subsection (a) above shall be corrected accordingly for each one-thousandth (.001) variation from six hundred thousandths (.600). Any special test which is made shall be applicable from the day made until the next regular test or other special test is made.

(d) Exact measurements of inside diameters of pipe runs and orifices shall be obtained to the nearest one-thousandth (.001) inch, which measurements shall be used in computation of coefficients.

(e) Pressure taps for meter installations shall be taken from pipe runs two and one-half (2-½) inside pipe diameters upstream and eight (8) inside pipe diameters downstream from the orifice.

(f) All orifice meter computations required in this Section 2 shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2 (Revised 1931). In the computations of the orifice coefficient, the calculation of "X" shall be carried to six (6) decimals and "C" shall be determined to three (3) decimal places by interpolations from tables on Pages 76 and 77 in Metric Metal Works Bulletin E-2 (Revised 1931). The pressure base, flowing temperature and specific gravity factors used shall consist of four (4) significant figures, unless the first digit is "1", in which case five (5) significant figures shall be used.

(g) In determining the volume of gas delivered through the orifice during a period, either the

observation method or the orifice chart integrator shall be used in reading the meter chart. The sum of the extensions obtained from the reading or integration of the meter chart shall be multiplied by the orifice coefficients, corrected in accordance with subsections (b) and (c) above, to obtain the gas volume for that chart.

(h) The volumes of gas as determined in the manner described above shall be adjusted to give effect to the deviation of such gas from Boyle's Law, as follows:

(1) There shall be determined the average pressure (gauge) at which the gas was metered during the period under consideration.

(2) The average temperature for the period under consideration shall be determined as provided in sub-section (b) above.

(3) There shall be selected from the table of multipliers, attached hereto and made a part hereof and identified as Exhibit "A", the multiplier corresponding to the average pressure and the average temperature as determined in (1) and (2) above; provided, however, that if at any time the composition of the gas delivered shall have materially changed so that said multipliers are no longer reasonable, Seller shall substitute appropriate multipliers.

(4) The corrected volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas de-

termined in the manner hereinabove set forth by the multiplier selected in (3) above.

3. Positive Meters—When positive meters are used for the measurement of gas, the flowing temperature of the gas metered shall be assumed to be sixty (60) degrees Farenheit, and no correction shall be made for any variation therefrom; provided, that Seller shall have the option of installing a recording thermometer, and if Seller exercises such option and installs such thermometer, correction shall be made for each degree variation in the average flowing temperature for each positive meter chart.

The volumes of gas determined shall be adjusted to give effect to the deviation of such gas from Boyle's Law, as follows:

(a) There shall be determined the average pressure (gauge) at which the gas was metered during the period under consideration.

(b) The average temperature for the period under consideration shall be determined as provided above.

(c) When the flowing temperature of the gas metered is assumed to be sixty (60) degrees Farenheit, there shall be selected from the table of positive meter multipliers, shown in sub-section (e) below, the multiplier correspond to the average pressure as determined in (a) above; and, when the flowing temperature of the gas metered be recorded as provided above, the multiplier shall be obtained by squaring the appropriate multi-

plier selected from the table of said Exhibit "A"; provided, however, that if at any time the composition of the gas delivered shall have materially changed so that said multipliers are no longer reasonable, Seller shall substitute appropriate multipliers.

(d) The corrected volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas hereinabove determined by the multiplier selected in (c) above.

(e) Boyle's Law Deviation Multipliers for Positive Meters:

Average Pressure PSIG	Assumed Temperature 60° F.
0-49	1.006
50-99	1.016
100-149	1.025
150-199	1.033
200-249	1.042
250-299	1.051
300-349	1.061
350-399	1.070
400-449	1.079
450-499	1.088

4. Determination of Heat Content—The Btu content of the gas delivered, when required to be determined under the provisions of this agreement, shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit, at an absolute pressure of fourteen and nine-tenths (14.9) pounds per square inch, and at the moisture content of the gas delivered. Such total heating value of the gas delivered shall be

determined by Seller, using a Thomas or other standard type calorimeter, either by taking a spot sample or by using a record from a recording calorimeter. The spot sample shall be taken as often as is found necessary in practice, and such sample shall be taken, or the recording calorimeter shall be located at a suitable point on Seller's line so that the heating value of the gas delivered may be obtained. The moisture content of the gas delivered shall be determined at a suitable point by Seller as often as is found necessary in practice.

IV.

MEASUREMENT EQUIPMENT

1. Ownership and Operation — Seller shall furnish, install, operate and maintain, at its own expense at the point(s) of delivery, the meters, instruments and equipment of standard type necessary to measure properly, in accordance with Article III hereof, the gas to be delivered. Seller shall likewise furnish, install, operate and maintain, at its own expense, such instruments and equipment as may be necessary at points other than the point(s) of delivery to obtain the information to measure properly, in accordance with Article III hereof, the gas to be delivered. The metering and other equipment installed, together with any buildings erected by it for such equipment, shall be and remain the property of Seller.

   Either party shall have access to the metering equipment of the other at all reasonable times, but the reading, calibration and adjustment thereof and changing of charts (unless otherwise mutually agreed upon) shall be done only by the employees or agents of the owner thereof. Charts and records from such metering equipment shall remain the property of the owner thereof. Upon request of the other party, the requested party will submit its records and charts from its metering equipment, together with calculations therefrom, for the requesting party's inspection and verification, subject to return within ten (10) days after receipt thereof, after which return they shall be kept on file by the owner thereof for the mutual use of both parties for a period of one (1) year.

2. Buyer's meters — Buyer may, at its option and expense, install and operate meters, instruments and equipment of standard type at or near any point of delivery to check Seller's meters, instruments and equipment, but the measurement of gas delivered shall be by Seller's meters only, except in cases herein provided to the contrary. The meters, instruments and equipment installed by Buyer shall be subject at all reasonable times to inspection or examination by Seller, but the reading, calibration and adjustment thereof and changing of charts (unless otherwise mutually agreed upon) shall be done by Buyer.

3. Notice of Meter Tests — Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the test so that the other party may conveniently have its representatives present; provided, however, that if either party has given such notice to the other party and the other party is not present at the time specified, then the party giving the notice may proceed with the test as though the other party were present.

At least once each thirty (30) days, on a day as near the first (1st) of each month as practical, each party shall calibrate its orifice meters and appurtenant instruments, and at least once each ninety (90) days, on a day as near the first (1st) of the month as practical, each party shall calibrate its positive displacement meters, all in the presence of representatives of the other, as hereinabove provided in this Section, and the parties shall jointly observe any adjustment made.

4. Correction for Errors of Meters — If, upon any test, the percentage of inaccuracy of any metering equipment is found to be in excess of two per cent (2%), registrations thereof shall be corrected for a period extending back to the time such inaccuracy occurred, if such time is ascertainable, and if not ascertanable, then back one-half of the time elapsed since the last date of calibration. If for any reason meters are out of service or out of repair, so that the amount of gas delivered cannot be ascertained or computed from the readings thereof, the gas delivered during the period such meters are out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meters are registering accurately.

V.

BILLING AND PAYMENTS

1. Billing Date — On or before the tenth (10th) day of each calendar month Seller shall render to Buyer, at such office as Buyer may designate, statements showing the calculation of the monthly bill for gas delivered by Seller to Buyer during the preceding billing month.

2. Payment Date — On or before the twentieth (20th) day of each calendar month Buyer shall make payments to Seller, at such office as Seller may designate, of amounts due Seller as shown by statements furnished Buyer in accordance with the foregoing Section 1.

3. Late Payment — In the event Buyer shall fail to pay any amount due Seller when the same is due, then interest thereon shall accrue at the rate of six per cent (6%) per annum from the date when such amount is due until the same is paid. If such failure to pay continues for sixty (60) days, Seller may suspend deliveries of gas, and the exercise of such right shall be in addition to any and all other remedies available to Seller.

4. Error in Bills — In the event an error is discovered in the amount billed in any statement rendered by Seller, such error shall be adjusted promptly.

5. Late Billing — If presentation of a bill to Buyer is delayed after the tenth (10th) day of the month, then the time of payment shall be extended accordingly unless Buyer is responsible for such delay.

6. Access to Billing Data — Buyer and Seller shall have the right to examine the books, records and charts of the other party at all reasonable times to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any article of this agreement.

VI.

POSSESSION OF GAS

Seller shall be in exclusive control and possession of the gas deliverable and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer, after which delivery Buyer shall be in exclusive control and possession thereof and responsible for any injury or damage caused thereby.

VII.

WARRANTY

Seller warrants generally the title to all gas delivered, and agrees to indemnify Buyer from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties or charges thereon.

VIII.

FORCE MAJEURE

1. Definition of "Force Majeure" — The term "force majeure" as employed herein shall mean acts of God,

strikes, lockouts, or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lighting, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome; such term shall likewise include (a) in those instances where either Buyer or Seller is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost, and after the exercise of reasonable diligence, such servitudes, rights of way grants, permits or licenses and (b) in those instances where either Buyer or Seller is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is required to secure permits or permission from any governmental agency to enable such party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such materials and supplies, permits and permissions.

2. Limitations on Obligations — In the event of either Buyer or Seller being rendered unable wholly or in

part by force majeure to carry out its obligations under this agreement, other than to make payments due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

3. Strikes and Lockouts — The settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and the above requirements that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

IX.

IMPAIRMENT OF DELIVERIES

Buyer specifically recognizes the fact that Seller delivers gas: (i) to gas utilities for resale to domestic consumers, and (ii) to public utility power plants for generation of electricity which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of (i) gas utilities selling gas to domestic consumers, and (ii) pub-

lic utility power plants using gas for generation of electricity which is sold to domestic consumers, shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers.

X.

PERIODIC REQUIREMENTS AND NOTIFICATION OF CHANGES

All gas taken hereunder sshall be taken in equal daily and hourly quantities as nearly as operating conditions will permit.

Buyer and Seller will notify each other from time to time as necessary of expected changes in the rates of daily delivery or takings of gas under this agreement, or in the pressures or other operating conditions, and the reasons for such expected changes as soon as such reasons come to the knowledge of either Buyer or Seller to the end that the other party may be prepared to meet or to take advantage of such expected changes when, as and if they occur.

XI.

SCOPE AND QUANTITIES

Subject to the terms, conditions, and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for, natural gas for all of the fuel requirements of Buyer's said Rex Brown Power Plant, Hinds County, Mississippi, and Buyer's said Baxter Wilson

Power Plant, Warrent County, Mississippi, and all extensions and enlargements of said plants.

During the period commencing with the date of execution hereof and extending to October 1, 1971, or such earlier date as Buyer places into operation its said new proposed 750,000 KW generating unit, Seller shall not be required to deliver to Buyer and Buyer shall not be required to purchase and receive from Seller hereunder at said Baxter Wilson Power Plant, more than a total maximum of 110,000 Mcf of gas in any one day.

During the period commening October 1, 1971, or such earlier date as Buyer places into operation its said new 750,000 KW unit at said Baxter Wilson Plant, Seller shall not be required to deliver to Buyer and Buyer shall not be required to purchase and receive from Seller hereunder for the total requirements of said Baxter Wilson Power Plant, more than a total of 275,000 Mcf of gas in any one day.

Seller shall not be required to deliver to Buyer and Buyer shall not be required to purchase and receive from Seller hereunder at said Rex Brown Power Plant, more than the total maximum of 80,000 Mcf of gas in any one day.

The above mentioned quantities for the periods indicated, unless and until changed as hereinafter provided, shall be the Maximum Daily Delivery Obligation.

If Buyer should, from time to time, require daily quantities of gas in excess of the Maximum Daily Delivery Obligation then in effect, Buyer shall notify Seller in writing, at least twelve (12) months in advance, of the daily quantity of gas by which Buyer's requirements will

exceed said Maximum Daily Delivery Obligation then in effect, stating in such notice the date on which such increase will occur. Within ninety (90) days after receipt of such notice, Seller shall elect, and so notify Buyer, whether Seller is agreeable to so increasing said Maximum Daily Delivery Obligation by the amount so requested by Buyer. In the event Seller elects to deliver such additional daily quantity of gas, the Maximum Daily Delivery Obligation then in effect shall be increased, on the date so specified in said notice or the first anniversary of the date on which said notice was given, whichever date is the later, by the additional quantity of gas required by Buyer as specified in said notice. In the event Seller does not elect to deliver such additional quantity of gas, Buyer shall thereafter have the right to make other arrangements or agreements for fuel for that portion of Buyer's daily requirements which is in excess of the Maximum Daily Delivery Obligation then in effect.

XII.

DELIVERY POINTS AND PRESSURES

The points of delivery for all gas to be delivered by Seller to Buyer hereunder for said (i) Rex Brown Power Plant shall be at the outlet side of a metering and regulating station as now installed by Seller and located on the site of Buyer's said Rex Brown Power Plant, located at Jackson, Hinds County, Mississippi and for said (ii) Baxter Wilson Power Plant shall be at the outlet side of a metering and regulating station as now installed by Seller and located on the site of Buyer's said Baxter Wilson Power Plant, located near Vicksburg, Warren County, Mississippi.

In the event any of Seller's facilities required to make deliveries of gas to Buyer hereunder are or will be located on the premises of Buyer then, and in such event, Buyer agrees to furnish to Seller, free of charge, the use of the premises so occupied or to be occupied by any of Seller's facilities which may be located on Buyer's premises, with the right of ingress and egress at all times for the purposes of installation, operation, repair and removal of said facilities.

The gas shall be delivered hereunder at such pressures as may be necessary to meet Buyer's requirements at each point of delivery; provided, however, that Seller shall not be obligated to maintain a pressure in excess of 50 pounds per square inch gauge at Buyer's Rex Brown Power Plant or 125 pounds per square inch gauge at Buyer's Baxter Wilson Power Plant.

XIII.

TERM

Subject to the other terms and conditions hereof, this agreement shall become effective on the date of execution hereof and extend to January 1, 1993, at 7:00 a.m.

XIV.

RATES

Subject to the adjustments hereinafter provided, the price to be paid by Buyer to Seller for all gas sold and delivered to Buyer at each separate point of delivery hereunder shall be as follows:

(A) For the period commencing on the date of execution of this agreement and extending to January 1, 1973, for all gas delivered by Seller to Buyer at Buyer's Rex Brown Power Plant and for gas delivered in quantities each day of 110,000 Mcf or less at Buyer's Baxter Wilson Power Plant, the following monthly rate for all gas shall apply:

MONTHLY RATE

76.25¢ per Mcf when total deliveries are between 0 and 150 Mcf
35.75¢ per Mcf when total deliveries are between 151 and 300 Mcf
32.75¢ per Mcf when total deliveries are between 301 and 1,500 Mcf
27.75¢ per Mcf when total deliveries are between 1,501 and 5,000 Mcf
25.75¢ per Mcf when total deliveries are between 5,001 and 10,000 Mcf
25.25¢ per Mcf when total deliveries are between 10,001 and 50,000 Mcf
24.75¢ per Mcf when total deliveries are between 50,001 and 85,000 Mcf
23.75¢ per Mcf when total deliveries are between 85,001 and 125,000 Mcf
22.75¢ per Mcf when total deliveries are between 125,001 and 160,000 Mcf
21.75¢ per Mcf when total deliveries are between 160,001 and 400,000 Mcf
21.25¢ per Mcf when total deliveries are over 400,000 Mcf

provided, however, that the above prices shall be increased or decreased, by the amount by which Seller's weighted average purchase price of gas for the preceding billing month in the Jackson Area exceeds or is less than 15¢

per Mcf; provided, further, that the maximum amount payable in each of the above steps shall never be more than the minimum amount which would be payable in the step next below. Weighted average purchase price of gas in the Jackson Area, or any other area, as outlined in Exhibit B attached hereto, shall be determined by: (1) adding together all the volumes of gas which Seller purchased in the area and transferred into the area during the preceding billing month; (2) adding together the cost payable by Seller for the gas it purchased in the area and the cost assignable to the gas transferred into the area during the preceding billing month, and (3) dividing the total of said costs payable by the total of said volumes purchased in and transferred into the area. The resulting quotient shall be the weighted average purchase price of gas in the area. In computing weighted average purchase price, costs as used in the steps outlined above shall be:

(a) Cost assignable to gas transferred into an area shall be the result obtained by multiplying the weighted average purchase price of gas in the area, from which the gas is transferred, by the volume of gas transferred.

(b) Cost of gas purchased on the seaward side of the shorelines of Florida, Alabama, Mississippi, Louisiana, and Texas, under contracts executed after January 1, 1968, shall be the amount payable to the producer, pipeline or other seller thereof, plus the amount, if any, payable by Seller to others for delivery of the gas onshore; or, if Seller's facilities are used to deliver such gas onshore, an amount obtained by (i) dividing 1/12th of 25% of the depreciated investment, at the beginning of the preceding billing month, in Seller's facilities used to deliver such gas on shore by the total volume of gas delivered through

such facilities during said billing month, and (ii) multiplying the result so obtained by the volume of gas purchased under contracts executed after January 1, 1968, and delivered through such facilities during said billing month.

(c) The cost of any other gas purchased by Seller shall be the amount payable by Seller to the producer, pipeline or other seller thereof; provided, that in the computation of the weighted average purchase price for the Jackson area neither the cost nor volumes of gas purchased by Seller from Tennessee Gas Pipeline Company for sale in nothern Mississippi shall be included in the computation.

(d) For the purpose of determining weighted average purchase price there shall be included as part of the cost of gas, all taxes (as hereinafter defined) which may be levied upon and paid by Seller, or which Seller under contractual or legal obligation pays to or for the person or company on which such taxes are levied, on or with respect to such gas prior to the receipt thereof by Seller in its Main Pipe Line System, but shall not include any deductions for compression of such gas or any payments for special services which may be provided for in Seller's gas purchase contracts.

(B) If, during the period hereof prior to January 1, 1973, Seller delivers gas to Buyer at said Baxter Wilson Power Plant in excess of 110,000 Mcf on any day, for the period beginning on the day Seller delivers such excess gas to the Baxter Wilson Power Plant and ending 365 days therefrom but in no event beyond January 1, 1973, the price for such excess gas shall be as set forth in (A) above. For the period beginning 365 days from the day Buyer first exceeds 110,000 Mcf on any day,

but in no even for a period extending beyond January 1, 1973, the price for such gas in excess of 110,000 Mcf on any day during such period shall be as set forth in (A) above except that each step of the monthly rate shall be increased by .75¢ per Mcf.

(C) During the period commencing January 1, 1973, and extending to January 1, 1978, the price for all gas delivered hereunder shall be the same rate as set forth in (A) above except that each step of the monthly rate shall be increased by 1.25¢ per Mcf.

(D) During the period commencing January 1, 1978, and extending to January 1, 1983, the price for all gas delivered hereunder shall be the same rate as set forth in (A) above except that each step of the monthly rate shall be increased by 1.75¢ per Mcf.

(E) During the period commencing January 1, 1983, and extending to January 1, 1988, the price for all gas delivered hereunder shall be the same rate as set forth in (A) above except that each step of the monthly rate shall be increased by 2.25¢ per Mcf.

(F) During the period prior to January 1, 1973, as to quantities of gas delivered by Seller to Buyer at Buyer's Baxter Wilson Power Plant in excess of 110,000 Mcf each day, and after January 1, 1973, as to all quantities of gas delivered by Seller to Buyer hereunder, the provisions of the next succeeding paragraph hereof shall apply.

During the respective periods and as to quantities provided for in the next above paragraph hereof, should Seller during any billing month deliver to Buyer gas hereunder containing a monthly average of less than 1,000 Btu per

cubic foot, then Seller's weighted average purchase price of gas as hereinabove defined in Section (A) of this article, shall be decreased 0.1% for each Btu that such monthly average is below 1,000 Btu per cubic foot.

(G) During the period commencing January 1, 1988, and extending to January 1, 1993, a price determined in the manner hereinafter provided in this subdivision (G).

At least ninety (90) days, but not more than 180 days, prior to the beginning of said period Seller shall determine and submit to Buyer in writing a new monthly rate for the gas deliverable hereunder during such period.

In the event the new monthly rate submitted by Seller represents an increase over the rate which is then in effect under the provisions of the preceding subdivision (E) hereof, Buyer shall notify Seller in writing at least thirty days prior to the beginning of the period to which such new monthly rate shall apply whether or not Buyer is agreeable to such new monthly rate so submitted by Seller; it being understood that if such rate does not represent any increase over the rate which is then in effect under the provisions of the preceding subdivision (E) hereof then such new monthly rate so submitted by Seller shall be in effect hereunder for the five-year period in question and Buyer shall not have the right to terminate this contract. If such new monthly rate should represent an increase over the rate which is then in effect under the provisions of the preceding subdivision (E) hereof and Buyer notifies Seller that it does not agree to such new increased monthly rate, Seller shall have the right at any time within ten days after receipt of Buyer's notice to continue the contract in force throughout the five-year period in question by notifying Buyer that it will continue

deliveries of gas through such period at the rate which is then in effect under the provisions of the preceding subdivision (E) hereof. However, if such new monthly rate should represent an increase over the rate which is then in effect under the provisions of the preceding subdivision (E) hereof and Buyer notifies Seller that it does not agree to such new monthly rate and Seller does not exercise its right in accordance with the foregoing to continue the contract in force, such contract shall, unless Buyer exercises its right to purchase gas during the period and on the conditions set forth in the next suceeding paragraph hereof, automatically terminate on the date of expiration of the period next preceding the period for which such new monthly rate is applicable. Should Buyer exercise the right set forth in the next succeeding paragraph hereof, this contract shall automatically terminate on the expiration of the right so granted to Buyer.

If Buyer does not agree to any such new monthly rate and Buyer has not made arrangements for its fuel requirements prior to the beginning of the period for which such new monthly rate is applicable, Buyer shall, upon giving Seller notice prior to the commencement of such period, have the right to continue to purchase gas from Seller during the period Buyer is making any necessary physical changes or arrangements for its fuel requirements on the same terms and conditions as set forth herein except that the price to be paid for gas delivered shall be in accordance with said new monthly rate so determined by Seller for the period under consideration and to which such monthly rate Buyer did not agree; provided, however, that Buyer shall notify Seller immediately upon the completion of such arrangements for supplying its said requirements at which time the right granted to Buyer

in this paragraph shall terminate and provided further that under no conditions shall this right extend beyond one year from the date this contract is subject to termination as hereinabove provided in the preceding paragraph hereof.

(H) If during any billing month Buyer uses fuel oil in lieu of the quantities of gas up to but not in excess of the Maximum Daily Delivery Obligation then in effect hereunder, which Seller is obligated to deliver to Buyer for Buyer's fuel requirements, either at Seller's request or in the event Seller is excused by reason of force majeure or proration of impaired deliveries from delivering such gas to Buyer for Buyer's fuel requirements hereunder (whether or not payments for the gas equivalent of such fuel oil so used shall be made by Buyer to Seller as provided in Article XVI), the gas equivalent, up to the Maximum Daily Delivery Obligation then in effect, of such fuel oil so used by Buyer during such billing month shall be determined in the same manner as set out in Article XVI, and the quantity of such gas equivalent shall be added to the total quantity of gas actually delivered and the sum of such two quantities shall be deemed to be the total gas deliveries during such month for the sole purpose of arriving at the rate per Mcf of gas, under the rate schedule provided for in this Article XIV, to be paid by Buyer to Seller for all gas delivered by Seller to Buyer during the month in question.

XV.

TAX REIMBURSEMENT

Buyer agrees to reimburse Seller for all taxes which may be levied upon and paid by Seller, or which Seller

under contractual or legal obligation pays to or for the person or company on which such taxes are levied on or with respect to the gas delivered hereunder; provided, however, that no reimbursement shall be made to Seller under the provisions of this article for any taxes which were included in the weighted average price of gas under the provisions of the above Monthly Rate.

The term "taxes" as used herein shall mean any tax (other than ad valorem, income or excess profits taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself, or on the act, right or privilege of production, serevance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term "taxes" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation.

XVI.

USE OF SUBSTITUTE FUEL

It is recognized by Buyer that in the pipe line operations of Seller it is desirable to relieve as far as possible conditions which cause excessive or peak demands of gas, and it is recognized by Seller that in the plant operations of Buyer it is desirable to eliminate any shutdowns caused by failure of the gas supply from whatsoever cause. Accordingly, in order to enable both Seller and Buyer to eliminate the above-described conditions, it is agreed that Buyer shall furnish or cause to be furnished at Buyer's sole cost and expense proper and adequate facilities (including oil storage tanks, fuel lines, oil meters and oil burning equipment) necessary to enable Buyer to use Number 2 grade fuel oil, to be purchased and supplied by Buyer in lieu of gas for Buyer's fuel requirements, up to the Maximum Daily Delivery Obligation then in effect, under the conditions hereinafter set forth; and that payments with reference to such fuel oil so used by Buyer shall be made between the parties hereto on the basis of Bunker "C" grade fuel oil as hereinafter specifically provided. All fuel oil so used by Buyer for its fuel requirements shall be accurately metered by Buyer as it is used.

If so requested by Seller at any time and from time to time, Buyer agrees that it will use Number 2 grade fuel oil purchased and supplied by Buyer, as above set forth, in lieu of gas for Buyer's fuel requirements hereunder during the period or periods of time so requested by Seller. In the event Seller is prohibited by governmental action or excused by reason of force majeure or proration of impaired deliveries from delivering gas to Buyer for Buyer's fuel requirements hereunder, up to the Maximum Daily Delivery Obligation then in effect, and Buyer uses Number 2 grade fuel oil for its fuel requirements, even though not so requested to do by Seller, during the period Seller is so prohibited or excused from delivering gas hereunder, all such fuel oil so used by Buyer during any period of not more than seven consecutive days shall be deemed to have been used by Buyer at Seller's request; provided, that during the time Seller is so prohibited or excused Seller shall have no bligation to pay for fuel oil used by Buyer after expiration of any such seven day period.

Payments with reference to fuel oil which is used by Buyer for its fuel requirements at Seller's request, up to

the Maximum Daily Delivery Obligation then in effect, as provided in the next preceding paragraph, shall be made between the parties on the basis on Bunker "C" grade fuel oil as hereinafter set forth.

On or before the fifth day of the month following any month hereunder during which Buyer used fuel oil for which payments are to be made between the parties as above provided, Buyer shall furnish to Seller a statement, together with supporting computations, calculations and determinations, showing:

(a) The number of barrels of fuel oil used by Buyer during the preceding billing month for its fuel requirements in lieu of the quantities of gas which Seller failed to deliver during such month up to but not in excess of the Maximum Daily Delivery Obligation in effect hereunder on any day.

(b) The weighted average (expressed in cents per barrel) of the purchase price of Bunker "C" grade fuel oil Buyer would have purchased, per barrel, f.o.b. Buyer's plant, for equivalent quantities of fuel oil in Buyer's storage facilities during the preceding month; such weighted average price shall not include any storage and handling costs and expense for such fuel oil at Buyer's plant, and shall not take into consideration any volumetric losses or gains resulting from the storage and handling of such fuel oil. Such weighted average price shall be determined as follows:

(1) Buyer shall at any time a purchase of Number 2 fuel oil is made, obtain a written quotation of the price of Bunker "C" fuel oil in the same quantity as the quantity of Number 2 fuel oil that Buyer purchases at such time.

(2) The sum of such quotation for Bunker "C" fuel oil plus the delivery charge incurred by Buyer for delivery into Buyer's tanks of the Number 2 fuel oil purchased shall be used by Buyer in determining such weighted average price.

(c) The amount of money due Buyer by Seller for such fuel oil so used by Buyer for its fuel requirements hereunder during such preceding month, which amount shall be determined by multiplying the number of barrels of fuel oil so used by Buyer during such preceding month as provided for in subparagraph (a) above, by the weighted average purchase price per barrel of Bunker "C" grade fuel oil as provided for in subparagraph (b) above.

Upon receipt of each such statement from Buyer, Seller shall determine the gas equivalent of such fuel oil so used by Buyer for its fuel requirements hereunder during such preceding month; such determination to be made on the basis of one barrel of Number 2 grade fuel oil being the equivalent of 6,000 cubic feet of gas. The total quantity of such gas equivalent, so determined, shall be added to the total quantity of gas actually delivered by Seller to Buyer hereunder during such preceding month in order to arrive at the Monthly Rate per Mcf to be paid by Buyer to Seller for such gas equivalent during the month in question. Such monthly rate per Mcf, so arrived at, shall be multiplied by the total quantity of such gas equivalent, so determined for the month in question as above provided, and the result of such multiplication, without any adjustment thereof for Btu, shall be the amount of money due Seller by Buyer for such gas equivalent during the month in question.

Proper adjustment shall be made on the bill to be rendered by Seller to Buyer for gas delivered by Seller to Buyer during the preceding month, to give effect to the amount of money due Buyer by Seller as above provided, for fuel oil so used by Buyer during such preceding month, and to the amount of money due Seller by Buyer, as above provided, for the gas equivalent of such fuel oil.

It is recognized that Buyer plans to use Number 2 grade fuel oil at Baxter Wilson Power Plant and Bunker "C" grade fuel oil at Rex Brown Power Plant. It is the intention of the parties hereto that the provisions of this Article apply to the use of Bunker "C" grade fuel oil the same as Number 2 grade fuel oil, by substituting the designation "Bunker 'C' " for "Number 2" when and where appropriate.

XVII.

REGULATORY REQUIREMENT

It is expressly recognized that before Seller may proceed with the construction of any necessary facilities to enable Seller to make deliveries of the additional quantities of gas contemplated to be delivered hereunder to Buyer's Baxter Wilson Power Plant, Seller must apply to the Federal Power Commission for a Certificate of Public Convenience and Necessity, authorizing the construction of said facilities and delivery of natural gas to Buyer.

Seller and Buyer agree to proceed with reasonable diligence with the filing and prosecution of applications for such governmental authorizations as may be respectively required of them for the construction of the facilities which each is required to construct under the provisions hereof and for the sale and purchase of gas hereunder.

Each party reserves the right to pursue its applications in such manner as it deems to be in its best interest, including the right to file whatever pleadings and motions it deems desirable. Neither party shall be obligated to accept any authorization which contains, in the opinion of the party receiving such authorization, unreasonable or onerous terms and conditions. In the event that Seller and Buyer have not by July 1, 1970, obtained such authorizations upon terms and conditions which are not unreasonable or onerous to the party receiving such authorization, then Seller or Buyer shall have the right at any time thereafter, but prior to the parties having been issued such authorization, to cancel this agreement by giving the other party written notice of such cancellation. Upon such cancellation both parties shall be relieved of any liability hereunder.

XVIII.

DULY CONSTITUTED AUTHORITIES

This agreement is especially made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction.

XIX.

SUPERSEDING OF PRIOR AGREEMENT

This agreement supersedes, cancels and terminates, as of the effective date hereof, as set forth in Article XIII hereof, the above mentioned agreement dated June 14, 1963, covering the sale and delivery of natural gas to Buyer for the purposes herein set forth. Both parties shall on said effective date be released from any and all obligations under said agreement of June 14, 1963, except as

to the obligation of Buyer to pay for all gas delivered to Buyer by Seller prior to said effective date and for which payment has not been made. Notwithstanding the provisions of this article, should this contract be canceled pursuant to the provisions of Article XVII, the contract of June 14, 1963, shall thereupon be reinstated and shall continue in effect according to its terms.

XX.

SUCCESSORS AND ASSIGNS

This contract shall be binding upon and inure to the benefit of the respective heirs, representatives, successors and assigns of the parties hereto.

If all or any part of Buyer's plants, facilities, and/or other property, into which the gas sold hereunder is received and/or utilized, are voluntarily sold or exchanged by Buyer, then, and in such event, Buyer agrees that it will cause the person, firm or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement, and Buyer further agrees that it will incorporate appropriate covenants to this effect in any act or conveyance or instrument of transfer which may be executed by it.

If all or any part of Seller's pipe line system through which the gas sold hereunder is delivered to Buyer is voluntarily sold or exchanged by Seller and Seller will thereby be rendered unable to supply to Buyer any gas which it is obligated to supply hereunder, then, and in such event, Seller agrees that it will cause the person, firm or corporation so acquiring such property to take

and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement applicable to the property so sold or exchanged and Seller further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

XXI.

DESCRIPTIVE HEADINGS

The descriptive headings of the provisions of this agreement are formulated and used for convenience only and shall not be deemed to affect the meaning or construction of any such provisions.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2) counterparts, each of which shall constitute an original, on the day and year first above written.

MISSISSIPPI POWER & LIGHT COMPANY	UNITED GAS PIPE LINE COMPANY
By /s/ R. B. WILSON President	By /s/ SIGNATURE ILLEGIBLE President
ATTEST:	ATTEST:
SIGNATURE ILLEGIBLE Secretary	/s/ R. B. BERRYMAN Secretary

BOYLE'S LAW DEVIATION MULTIPLIERS
FOR NATURAL GASES

Average Pressure Psia	Average Temperature - °F																					Average Pressure Psia
	40-44	45-49	50-54	55-59	60-64	65-69	70-74	75-79	80-84	85-89	90-94	95-99	100-104	105-109	110-114	115-119	120-124	125-129	130-134	135-139	140-144	145-149	
[illegible]	1.004	1.004	1.004	1.003	1.003	1.003	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	[illegible]
[illegible]	1.008	1.008	1.009	1.008	1.008	1.008	1.008	1.007	1.007	1.007	1.007	1.006	1.006	1.006	1.006	1.006	1.006	1.005	1.005	1.005	1.005	1.005	[illegible]
[illegible]	1.014	1.014	1.013	1.013	1.013	1.012	1.011	1.011	1.010	1.010	1.010	1.009	1.009	1.009	1.008	1.008	1.008	1.008	1.008	1.007	1.007	1.007	[illegible]
[illegible]	1.019	1.019	1.017	1.017	1.016	1.016	1.016	1.015	1.014	1.014	1.014	1.013	1.013	1.012	1.012	1.011	1.011	1.011	1.010	1.010	1.009	1.009	[illegible]
[illegible]	1.024	1.024	1.022	1.022	1.021	1.020	1.020	1.019	1.018	1.018	1.017	1.017	1.017	1.016	1.015	1.015	1.014	1.014	1.013	1.013	1.012	1.011	[illegible]
[illegible]	1.029	1.028	1.027	1.026	1.025	1.024	1.024	1.023	1.022	1.021	1.021	1.020	1.019	1.019	1.018	1.017	1.016	1.016	1.015	1.015	1.015	1.014	[illegible]
[illegible]	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.024	1.023	1.022	1.021	1.020	1.020	1.019	1.018	1.017	1.017	1.016	[illegible]
[illegible]	1.039	1.038	1.038	1.036	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.023	1.022	1.021	1.021	1.020	1.019	1.019	[illegible]
[illegible]	1.044	1.043	1.041	1.040	1.039	1.038	1.036	1.035	1.034	1.033	1.032	1.031	1.030	1.029	1.027	1.026	1.025	1.024	1.023	1.022	1.021	1.021	[illegible]
[illegible]	1.050	1.048	1.046	1.045	1.043	1.042	1.040	1.039	1.038	1.036	1.035	1.034	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.023	[illegible]
[illegible]	1.055	1.053	1.051	1.049	1.048	1.046	1.045	1.043	1.041	1.040	1.039	1.037	1.036	1.035	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	[illegible]
[illegible]	1.060	1.059	1.056	1.054	1.052	1.051	1.049	1.047	1.045	1.044	1.042	1.040	1.039	1.038	1.035	1.033	1.032	1.031	1.030	1.029	1.028	1.026	[illegible]
[illegible]	1.066	1.064	1.062	1.060	1.057	1.056	1.053	1.052	1.049	1.048	1.046	1.044	1.042	1.041	1.039	1.038	1.036	1.035	1.034	1.033	1.031	1.030	[illegible]
[illegible]	1.072	1.069	1.067	1.064	1.062	1.060	1.057	1.056	1.053	1.052	1.050	1.048	1.046	1.044	1.042	1.041	1.040	1.038	1.036	1.035	1.033	1.032	[illegible]
[illegible]	1.077	1.075	1.072	1.069	1.067	1.064	1.061	1.059	1.057	1.055	1.052	1.051	1.049	1.047	1.045	1.044	1.042	1.041	1.039	1.038	1.036	1.035	[illegible]
[illegible]	1.083	1.081	1.077	1.074	1.071	1.068	1.066	1.063	1.061	1.059	1.056	1.054	1.052	1.050	1.049	1.047	1.045	1.043	1.041	1.040	1.039	1.037	[illegible]
[illegible]	1.088	1.086	1.082	1.079	1.076	1.072	1.070	1.067	1.064	1.062	1.060	1.058	1.056	1.054	1.052	1.050	1.048	1.046	1.044	1.043	1.041	1.040	[illegible]
[illegible]	1.094	1.091	1.087	1.084	1.081	1.078	1.075	1.072	1.069	1.066	1.064	1.062	1.060	1.058	1.055	1.053	1.051	1.050	1.047	1.046	1.044	1.042	[illegible]
[illegible]	1.099	1.096	1.092	1.089	1.086	1.083	1.080	1.077	1.074	1.071	1.069	1.067	1.065	1.063	1.061	1.059	1.057	1.055	1.053	1.051	1.049	1.047	[illegible]
[illegible]	1.104	1.101	1.097	1.094	1.091	1.088	1.085	1.082	1.079	1.076	1.073	1.071	1.069	1.068	1.065	1.063	1.061	1.059	1.057	1.056	1.054	1.052	[illegible]
[illegible]	1.111	1.110	1.102	1.099	1.096	1.093	1.090	1.087	1.084	1.081	1.078	1.076	1.073	1.071	1.069	1.068	1.065	1.063	1.061	1.059	1.057	1.056	[illegible]
[illegible]	1.117	1.115	1.107	1.104	1.101	1.098	1.095	1.092	1.089	1.086	1.083	1.080	1.077	1.074	1.072	1.069	1.067	1.064	1.062	1.060	1.058	1.056	[illegible]
[illegible]	1.122	1.117	1.111	1.108	1.102	1.097	1.095	1.092	1.089	1.086	1.083	1.080	1.077	1.074	1.072	1.069	1.067	1.064	1.062	1.060	1.057	1.055	[illegible]
[illegible]	1.127	1.122	1.116	1.113	1.106	1.101	1.097	1.095	1.092	1.089	1.086	1.083	1.080	1.077	1.074	1.072	1.069	1.066	1.064	1.062	1.059	1.057	[illegible]
[illegible]	1.132	1.127	1.121	1.117	1.110	1.105	1.103	1.099	1.096	1.092	1.089	1.086	1.083	1.080	1.077	1.074	1.071	1.069	1.066	1.064	1.061	1.059	[illegible]
[illegible]	1.138	1.131	1.125	1.121	1.114	1.109	1.106	1.103	1.099	1.096	1.092	1.089	1.086	1.083	1.080	1.077	1.074	1.071	1.069	1.066	1.064	1.061	[illegible]
[illegible]	1.143	1.136	1.129	1.125	1.117	1.112	1.109	1.106	1.102	1.099	1.095	1.092	1.089	1.086	1.083	1.080	1.077	1.074	1.071	1.069	1.066	1.064	[illegible]
[illegible]	1.148	1.141	1.134	1.129	1.121	1.116	1.112	1.109	1.105	1.102	1.098	1.095	1.092	1.089	1.086	1.083	1.080	1.077	1.074	1.071	1.069	1.066	[illegible]
[illegible]	1.154	1.146	1.138	1.133	1.125	1.120	1.116	1.112	1.108	1.105	1.101	1.098	1.095	1.092	1.089	1.086	1.083	1.080	1.077	1.074	1.071	1.069	[illegible]
[illegible]	1.159	1.151	1.143	1.138	1.129	1.124	1.119	1.116	1.112	1.108	1.104	1.101	1.098	1.095	1.092	1.089	1.086	1.083	1.080	1.077	1.074	1.071	[illegible]

Exhibit "A"
Contract Mississippi Power & Light Company

OKLAHOMA

ARKANSAS

TENNESSEE

A77

MISSISSIPPI

ALABAMA

NORTHERN AREA

TEXAS

SIANA

JACKSON AREA

S. W. TEXAS AREA

LAFAYETTE AREA

NEW ORLEANS AREA

BEAUMONT-HOUSTON AREA

ICO

EXHIBIT "B"

UNITED GAS PIPE LINE COMPANY
Shreveport, Louisiana

December 8, 1967

Mississippi Power & Light Company
Electric Building
Jackson, Mississippi 39205

Gentlemen:

We have, as of even date herewith, entered into a Gas Sales Contract with you relating to the sale and purchase of gas for the fuel requirements for your Rex Brown plant at Jackson, Mississippi, and the Baxter Wilson plant near Vicksburg, Mississippi.

The hereinabove described contract provides for a monthly "step rate" which is computed on the basis of the monthly quantities of gas delivered at each delivery point. The lowest rate available at any delivery point is during months in which the volumes delivered exceed 400,000 Mcf. You have advised that you will have periodic shutdowns for inspection and maintenance of your machinery so as to properly maintain all of your equipment as well as minimize the possibilities of any breakdowns, and you have inquired as to whether such events are covered under the provisions of Article VIII (force majeure) of our contract so as to assure you of the same rates you would have had if such shutdowns had not occurred. We are of the opinion that these events do not come within the provisions of Article VIII of our contract. However, we are willing, in computing the monthly rate provided for in Article XIV of the contract, to give you credit for the down time occasioned by such inspections and shutdown periods so that when the monthly rate is computed you will pay for gas on the same basis as you would have paid if the plant had been operating during

such shutdown periods, provided that you give us proper notice relating to such shutdowns in the same manner as provided in said Article VIII. You will then be assured that such shutdown periods will not in anywise increase the price to be paid by you for gas delivered under the contract.

If the above is satisfactory with you, please signify your acceptance on the duplicate originals hereof in the space provided below and return one of the duplicate originals to us, thus constituting this letter an agreement between us. This letter shall be considered a part of the contract between us of even date herewith.

Yours very truly,

UNITED GAS PIPE LINE COMPANY

By SIGNATURE ILLEGIBLE
President

Accepted and agreed to:

MISSISSIPPI POWER & LIGHT COMPANY

By /s/ R. B. WILSON
President

EXHIBIT "C"

AMENDATORY AGREEMENT

Between

UNITED GAS PIPE LINE COMPANY

and

MISSISSIPPI POWER & LIGHT COMPANY

Dated January 15, 1969

THIS AGREEMENT made and entered into this 15th day of January, 1969, by and between UNITED GAS PIPE LINE COMPANY, a Delaware corporation, hereinafter called "Seller", and MISSISSIPPI POWER & LIGHT COMPANY, a Mississippi corporation, hereinafter called "Buyer";

WITNESSETH:

WHEREAS, Seller is selling and delivering to Buyer and Buyer is purchasing and receiving from Seller natural gas for all of the fuel requirements of Buyer's Rex Brown Power Plant located at Jackson, in Hinds County, Mississippi, and Buyer's Baxter Wilson Power Plant located near Vicksburg, in Warren County, Mississippi, under the terms and conditions of that certain agreement dated December 8, 1967, between Seller and Buyer;

WHEREAS, the above mentioned agreement of December 8, 1967, provides that in the event Seller and Buyer have not by July 1, 1970, obtained the necessary governmental authorizations either Seller or Buyer shall have certain cancellation rights; and

WHEREAS, Seller and Buyer desire to amend Article XVII, Regulatory Requirement, of the above mentioned agreement to reflect more fully the understanding between Seller and Buyer in connection with the filing and prosecution of the necessary governmental applications;

NOW, THEREFORE, in consideration of the mutual covenants and obligations herein contained and assumed by each party, the parties hereto covenant and agree as follows:

1.

From and after the date of execution hereof, Article XVII, Regulatory Requirement, of the above mentioned agreement of December 8, 1967, shall be changed and amended so that said Article shall thereafter, in its entirety, read as follows:

"XVII.

"REGULATORY REQUIREMENT

"It is expressly recognized that before Seller may proceed with the construction of any necessary facilities to enable Seller to make deliveries of the additional quantities of gas contemplated to be delivered hereunder to Buyer's Baxter Wilson Power Plant, Seller must apply to the Federal Power Commission for a Certificate of Public Convenience and Necessity, authorizing the construction of said facilities and delivery of natural gas to Buyer.

"Seller and Buyer agree to proceed with reasonable diligence with the filing and prosecution of applications for such governmental authorizations as may be respectively required of them for the construction of the facilities

which each is required to construct under the provisions hereof and for the sale and purchase of gas hereunder; provided, however, that should Seller not have filed with the Federal Power Commission an application for a Certificate of Public Convenience and Necessity on or before May 1, 1969, Buyer shall have the right, upon written notice delivered to Seller before Seller should have filed such an application, to cancel this contract. Each party otherwise reserves the right to pursue its applications in such manner as it deems to be in its best interest, including the right to file whatever pleadings and motions it deems desirable. Neither party shall be obligated to accept any authorization which contains, in the opinion of the party receiving such authorization, unreasonable or onerous terms and conditions. In the event that Seller and Buyer have not by January 1, 1970, obtained such authorizations upon terms and conditions which are not unreasonable or onerous to the party receiving such authorization, then Seller or Buyer shall have the right at any time thereafter, but prior to the parties having been issued such authorization, to cancel this agreement by giving the other party written notice of such cancellation. In the event Buyer exercises its option to cancel this contract because Seller has not timely applied to the Federal Power Commission for a Certificate of Public Convenience and Necessity, as provided above, or in the event either party exercises its option to cancel this contract because either party has not timely received acceptable regulatory authorization, as provided above, then, and in any such event, both parties and either party shall be relieved of all liability hereunder, including liability for damages, if any, incurred by the other party as a result of the cancellation."

2.

Except as herein specifically changed and amended the above mentioned agreement of December 8, 1967, shall remain in full force and effect as written.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2) counterparts, each of which shall constitute an original, on the day and year first above written.

ATTEST:

/s/ Signature Illegible
Assistant Secretary

UNITED GAS PIPE LINE COMPANY

By /s/ Signature Illegible
President

ATTEST:

/s/ Signature Illegible
Secretary

MISSISSIPPI POWER & LIGHT COMPANY

By /s/ R. B. WILSON
Vice President

EXHIBIT "D"

AMENDATORY AGREEMENT

Between

UNITED GAS PIPE LINE COMPANY

And

MISSISSIPPI POWER & LIGHT COMPANY

Dated April 29, 1969

THIS AGREEMENT made and entered into this 29th day of April, 1969, by and between UNITED GAS PIPE LINE COMPANY, a Delaware corporation, hereinafter called "Seller", and MISSISSIPPI POWER & LIGHT COMPANY, a Mississippi corporation, hereinafter called "Buyer";

WITNESSETH:

WHEREAS, Seller is selling and delivering to Buyer and Buyer is purchasing and receiving from Seller natural gas for all of the fuel requirements of Buyer's Rex Brown Power Plant located at Jackson, in Hinds County, Mississippi, and Buyer's Baxter Wilson Power Plant located near Vicksburg, in Warren County, Mississippi, under the terms and conditions of that certain agreement dated December 8, 1967, as amended, between Seller and Buyer; and

WHEREAS, Seller and Buyer desire to amend Article XIV, Rates, of the above mentioned agreement to reflect more fully the understanding between Seller and Buyer;

NOW, THEREFORE, in consideration of the mutual covenants and obligations herein contained and assumed by each party, the parties hereto covenant and agree as follows:

1.

From and after the date of execution hereof, Article XIV, Rates, of the above mentioned agreement of December 8, 1967, shall be changed and amended so that said Subsection (A) of Article XIV shall thereafter read as follows:

"(A) For the period commencing on the date of execution of this agreement and extending to January 1, 1973, for all gas delivered by Seller to Buyer at Buyer's Rex Brown Power Plant and for gas delivered in quantities each day of 110,000 Mcf or less at Buyer's Baxter Wilson Power Plant, the following monthly rate for all gas shall apply:

"MONTHLY RATE

76.25¢ per Mcf when total deliveries are between 0 and 150 Mcf
35.75¢ per Mcf when total deliveries are between 151 and 300 Mcf
32.75¢ per Mcf when total deliveries are between 301 and 1,500 Mcf
27.75¢ per Mcf when total deliveries are between 1,501 and 5,000 Mcf
25.75¢ per Mcf when total deliveries are between 5,001 and 10,000 Mcf
25.25¢ per Mcf when total deliveries are between 10,001 and 50,000 Mcf
24.75¢ per Mcf when total deliveries are between 50,001 and 85,000 Mcf
23.75¢ per Mcf when total deliveries are between 85,001 and 125,000 Mcf
22.75¢ per Mcf when total deliveries are between 125,001 and 160,000 Mcf
21.75¢ per Mcf when total deliveries are between 160,001 and 400,000 Mcf
21.25¢ per Mcf when total deliveries are over 400,000 Mcf

provided, however, that the above prices shall be increased or decreased, by the amount by which Seller's weighted average purchase price of gas for the preceding billing month in the Jackson Area, as outlined in Exhibit B (Drawing UB21566 1-1-69) attached hereto, exceeds or is less than 15¢ per Mcf; provided, further, that the maximum amount payable in each of the above steps shall never be more than the minimum amount which would be payable in the step next below. Seller's weighted average purchase price of gas in the Jackson Area, shall be determined by: (1) adding together all the volumes of gas which Seller purchased in the area and transferred into the area during the preceding billing month; (2) adding together the cost payable by Seller for the gas it purchased in the area and the cost assignable to the gas transferred into the area during the preceding billing month, and (3) dividing the total of said costs payable by the total of said volumes purchased in and transferred into the area. The resulting quotient shall be the weighted average purchase price of gas in the area. In computing weighted average purchase price, costs as used in the steps outlined above shall be:

"(a) Subject to the provisions of paragraph (b) hereof, the cost of gas purchased by Seller shall be the amount payable by Seller to the producer, pipeline or other seller; except that the cost of gas purchased on the seaward side of the shorelines of Florida, Alabama, Mississippi, Louisiana, and Texas, under contracts executed after January 1, 1968, shall be the amount payable to the producer, pipeline or other seller thereof, plus the amount, if any, payable by Seller to others for delivery of the gas onshore; or, if Seller's facilities are used to deliver such gas onshore, an amount obtained by (i) dividing 1/12th

of 25% of the depreciated investment, at the beginning of the preceding billing month, in Seller's facilities used to deliver such gas onshore by the total volume of gas delivered through such facilities during said billing month, and (ii) multiplying the result so obtained by the volume of gas purchased by Seller under contracts executed after January 1, 1968, and delivered through such facilities during said billing month.

"(b) The cost of gas purchased by Seller shall include as a part thereof all taxes (as hereinafter defined) which may be levied upon and paid by Seller, or which Seller under contractual or legal obligation pays to or for the person or company on which such taxes are levied, on or with respect to such gas prior to the receipt thereof by Seller in its Main Pipe Line System, but shall not include any deductions for compression of such gas or any payments for special services which may be provided for in Seller's gas purchase contracts.

"(c) Cost assignable to gas transferred into the Jackson Area shall be the result obtained by multiplying the weighted average price paid by Seller for gas purchased in its South Louisiana Area, as outlined in Exhibit B (Drawing UB21566 1-1-69) attached hereto, and in the Gulf of Mexico for delivery onshore in the South Louisiana Area, by the volume of gas transferred into the Jackson Area.

"(d) In the computation of the weighted average purchase price for the Jackson Area neither the cost nor volumes of gas purchased by Seller for Tennessee Gas Pipeline Company for sale in northern Mississippi shall be included in the computation in the computation."

2.

Except as herein specifically changed and amended, the above mentioned agreement of December 8, 1967, as heretofore amended, shall remain in full force and effect as written.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2) counterparts, each of which shall constitute an original, on the day and year first above written.

ATTEST:

/s/ Signature Illegible
Assistant Secretary

UNITED GAS PIPE LINE COMPANY

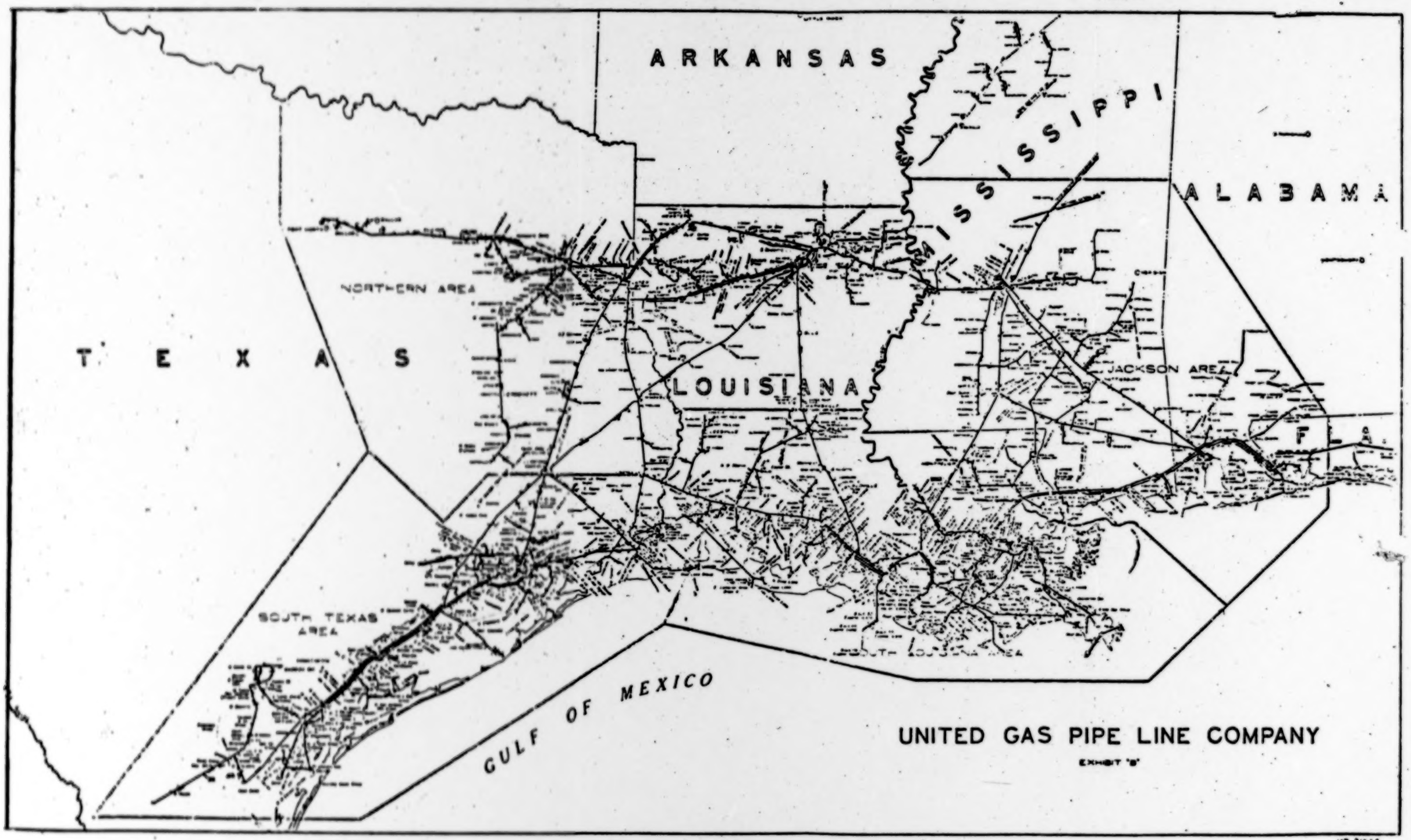
By /s/ Signature Illegible
President

ATTEST:

/s/ Signature Illegible
Assistant Secretary

MISSISSIPPI POWER & LIGHT COMPANY

By /s/ R. B. WILSON
President



UNITED GAS PIPE LINE COMPANY

EXHIBIT "B"

UB 21566

EXHIBIT "E"

UNITED GAS PIPE LINE COMPANY
Post Office Box 1407
Shreveport, Louisiana 71102
318 422-8631

June 19, 1969

Mr. R. Baxter Wilson, President
Mississippi Power & Light Company
Electric Building
Jackson, Mississippi 39205

Dear Mr. Wilson:

By our letter of May 22, 1969, we advised you that certain provisions of Subparagraph (B) of Article XIV of our agreement with you dated December 8, 1967, as amended, would become effective March 1, 1969.

While you have taken exception to our position in this matter, we feel that the notification given you in our above mentioned letter of May 22, is correct and expresses the intent of the contract as written. However, in order to resolve our differences, we are willing to agree with you that, in lieu of our said position, the next time after date of this letter that our deliveries of gas to you at your Baxter Wilson Power Plant exceeds 110,000 Mcf on any day then such happening shall activate the beginning of the 365 day period referred to in said Subparagraph (B) of Article XIV, entitled Rates, of the above mentioned contract between us dated December 8, 1967, as amended.

If the foregoing is agreeable to you, kindly acknowledge your agreement by signing in the space provided below and return a copy hereof to us for our file.

Yours very truly,

UNITED GAS PIPE LINE COMPANY

/s/ V. S. BRENNAN
V. S. Brennan
Vice President

Accepted and Agreed to:

MISSISSIPPI POWER & LIGHT COMPANY

By /s/ R. B. WILSON
President

EXHIBIT "F"

AMENDATORY AGREEMENT

Between

UNITED GAS PIPE LINE COMPANY

And

MISSISSIPPI POWER & LIGHT COMPANY

Dated March 12, 1970

THIS AGREEMENT made and entered into this 13th day of March, 1970, by and between UNITED GAS PIPE LINE COMPANY, a Delaware corporation, hereinafter called "Seller", and MISSISSIPPI POWER & LIGHT COMPANY, a Mississippi corporation, hereinafter called "Buyer";

W I T N E S S E T H :

WHEREAS, Seller is selling and delivering to Buyer and Buyer is purchasing and receiving from Seller natural gas for the fuel requirements of Buyer's Rex Brown Power Plant located at Jackson in Hinds County, Mississippi, and Buyer's Baxter Wilson Power Plant located near Vicksburg in Warren County, Mississippi, under the terms and conditions of that certain agreement dated December 8, 1967, as amended, between Seller and Buyer; and

WHEREAS, Seller and Buyer desire to amend Articles XI, XIV and XVII of the above mentioned agreement to reflect an agreement between the parties due to circumstances now existing.

NOW, THEREFORE, in consideration of the mutual covenants and obligations herein contained and assumed

by each party, the parties hereto covenant and agree as follows:

1.

From and after the date of execution hereof, the above mentioned agreement of December 8, 1967, shall be changed and amended so that Article XI, Scope and Quantities, shall thereafter in its entirety read as follows:

"XI.

"SCOPE AND QUANTITIES

"Subject to the terms, conditions, and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer and Buyer agrees to purchase and receive from Seller and pay Seller for, natural gas for use by Buyer as fuel in Buyer's Rex Brown Power Plant, Hinds County, Mississippi, and Buyer's Baxter Wilson Power Plant, Warren County, Mississippi, in an aggregate daily quantity not to exceed 190,000 Mcf for both plants, which quantity shall be the Maximum Daily Delivery Obligation hereunder.

"During the period commencing with the date of execution hereof, and extending to October 1, 1971, or such earlier date as Buyer places into operation its said new 750,000 KW generating unit now being installed at said Baxter Wilson Power Plant, Seller shall not be required to deliver to Buyer and Buyer shall not be required to purchase and receive from Seller hereunder at said Baxter Wilson Power Plant, more than a total maximum of 110,000 Mcf of gas in any one day.

"During the period commencing on October 1, 1971, or such earlier date as Buyer places into operation its

said new 750,000 KW unit at said Baxter Wilson Plant, Seller shall not be required to deliver to Buyer at Baxter Wilson Plant, and Buyer shall not be required to purchase and receive from Seller hereunder at such plant more than a total maximum of 190,000 Mcf of gas in any one day.

"Seller shall not be required to deliver to Buyer and Buyer shall not be required to purchase and receive from Seller at said Rex Brown Power Plant more than a total maximum of 30,000 Mcf of gas in any one day.

"It is understood and agreed that Buyer may, upon reasonable notice to Seller, and subject to the obligation set out in subsection (1) of Article XIV, vary its taking of gas from Seller as between said Rex Brown Power Plant and said Baxter Wilson Power Plant provided that in no event shall the total aggregate take for both plants exceed the Maximum Daily Delivery Obligation of 190,000 Mcf nor shall the total daily take at each of Buyer's said plants exceed the respective maximum quantities as specifically hereinabove set forth."

2.

From and after the date of execution hereof, Article XIV, Rates, shall be amended so as to add at the end of said Article an additional paragraph designated "(I)" which shall read as follows:

"(I) It is recognized that upon the completion and placing into operation of Buyer's said new 750,000 KW Unit at said Baxter Wilson Plant, Buyer will purchase a portion of its fuel requirements from other sources. In recognition thereof, Buyer agrees, effective on the first day of the month following the placing into commercial

operation of said new 750,000 KW unit, to take or pay Seller for, whether taken or not, a minimum annual quantity of gas of 34,674,000 Mcf during any calendar year. In the event less than a year is involved in calculating the minimum quantity, then such minimum quantity for such portion of a year shall be determined by multiplying the number of days in such period by 95,000 Mcf. In the event Buyer is so required to make an annual minimum payment, Buyer may make up such deficiency during the following calendar year by promptly notifying Seller of its intention so to do; provided, however, that in making up such deficiency, Buyer may not in any one day take in excess of 190,000 Mcf of gas, the Maximum Daily Delivery Obligation as provided for in Article XI hereof."

3.

From and after the date of execution hereof the above mentioned agreement of December 8, 1967, shall be changed and amended so that Article XVII, Regulatory Requirement, shall thereafter, in its entirety, read as follows:

"XVII

"REGULATORY REQUIREMENT

"It is expressly recognized that before Seller may proceed with the construction of facilities, if any, to enable Seller to make deliveries of the additional quantities of gas contemplated to be delivered hereunder to Buyer's Baxter Wilson Power Plant, Seller must apply to the Federal Power Commission for a Certificate of Public Convenience and Necessity, authorizing the construction of any such facilities and delivery of natural gas to Buyer.

"Seller and Buyer agree to proceed with reasonable diligence with the filing and prosecution of applications for such governmental authorizations as may be respectively required of them for the construction of the facilities, if any, which each is required to construct under the provisions hereof and for the sale and purchase of gas hereunder. Each party reserves the right to pursue its applications in such manner as it deems to be in its best interest, including the right to file whatever pleadings and motions it deems desirable. Neither party shall be obligated to accept any authorization which contains, in the opinion of the party receiving such authorization, unreasonable or onerous terms and conditions. In the event that Seller and Buyer have not by April 1, 1970, obtained such authorizations upon terms and conditions which are not unreasonable or onerous to the party receiving such authorization, then Seller or Buyer shall have the right at any time thereafter, but prior to the parties having been issued such authorization, to cancel this agreement by giving the other party written notice of such cancellation. In the event either party exercises its option to cancel this contract because either party has not timely received acceptable regulatory authorization, as provided above, then, and in any such event, both parties and either party shall be relieved of all liability hereunder, including liability for damages, if any, incurred by the other party as a result of the cancellation."

4.

Except as herein specifically changed and amended, the above mentioned agreement of December 8, 1967, as heretofore amended, shall remain in full force and effect as written.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals to be hereunto affixed in two (2) counterparts, each of which shall constitute an original, on the day and year first above written.

UNITED PIPE LINE COMPANY

ATTEST:

/s/ Signature Illegible
Assistant Secretary

By /s/ Signature Illegible
Vice President

MISSISSIPPI POWER & LIGHT COMPANY

ATTEST:

/s/ Signature Illegible
Assistant Secretary

By /s/ Signature Illegible
President

EXHIBIT "G"

UNITED GAS PIPE LINE COMPANY
Post Office Box 1407
Shreveport, Louisiana 71102
318 422-8631

March 12, 1970

Mississippi Power & Light Company
Electric Building
Jackson, Mississippi 39205

Gentlemen:

Please refer to the contract between us dated December 8, 1967, as heretofore amended, relating to the sale and purchase of gas for the fuel requirements of your Rex Brown Plant at Jackson, Mississippi, and your Baxter Wilson Plant at Vicksburg, Mississippi, and refer specifically to that certain Letter Agreement also dated December 8, 1967.

The hereinabove described contract, as amended, provides for a monthly "step rate" which is computed on the basis of the monthly quantities of gas delivered at each delivery point. The lowest rate available at any delivery point is during months in which the volumes delivered exceed 400,000 Mcf.

As of even date herewith, we have entered into an Amendatory Agreement to the above mentioned contract of December 8, 1967, which provides that you take or pay for, whether taken or not, a minimum annual quantity of gas as therein set forth. You have advised that you will have periodic shutdowns for inspection and maintenance of your machinery so as to properly maintain all

of your equipment as well as minimize the possibilities of any breakdowns, and you have inquired as to whether such events are covered under the provisions of Article VIII (Force Majeure) of our said contract so as to assure you of the same rates you would have had if such shutdowns had not occurred, and also to assure you that you would not be penalized by being required to pay for an annual minimum quantity of gas.

We are of the opinion that these events do not come within the provisions of Article VIII of our contract. However, we are willing, in computing the monthly rate and the annual minimum quantity so provided for, to give you credit for the down time occasioned by such inspections and shutdown periods so that when the monthly rate or annual minimum quantity are computed you will pay for the gas taken, and the annual minimum quantity shall be calculated, on the same basis as you would have paid if the plant had been operating during such shutdown periods, provided that you give us proper notice relating to such shutdowns in the same manner as provided in said Article VIII. It is, of course, understood that any such situation shall to the extent possible be remedied with all reasonable dispatch. You will then be assured that such shutdown periods will not in anywise increase the price to be paid by you for gas delivered and you will not be penalized in the calculation of the annual minimum quantity of gas to be taken under the contracts.

This Letter Agreement supersedes in all respects the hereinabove mentioned Letter Agreement of December 8, 1967.

If the above is satisfactory with you, please signify your acceptance on the duplicate originals hereof in the space provided below and return one of the duplicate originals to us, thus constituting this letter an agreement between

us. This letter shall be considered a part of the contract between us of even date herewith.

Yours very truly,

UNITED GAS PIPE LINE COMPANY

/s/ V. S. BRENNAN
V. S. Brennan
Vice President

Accepted and agreed to:
MISSISSIPPI POWER & LIGHT COMPANY
By /s/ Signature Illegible

President

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J74-185(C)

(Filed February 20, 1975)

MISSISSIPPI POWER & LIGHT COMPANY,
Plaintiff

v.

UNITED GAS PIPE LINE COMPANY, ET AL,
Defendants

ORDER ON MOTIONS TO INTERVENE

On timely motions duly filed and presented, the Court being fully advised in the premises: The motion of the City of Jackson and the motion of the Mississippi Public Service Commission to intervene herein under Civil Rule 24 are denied. The motion of the State of Mississippi to intervene under Civil Rule 24 and to participate in all proceedings as a party is well taken and is granted.

ORDERED, this February 20, A. D., 1975.

/s/ HOWARD COX
United States District Judge

APPENDIX I

(Filed February 20, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J74-185(c)

MISSISSIPPI POWER & LIGHT COMPANY and
THE STATE OF MISSISSIPPI, Applicant for Intervention,
Plaintiffs

v.

UNITED GAS PIPE LINE COMPANY and
PENNZOIL COMPANY
Defendants

COMPLAINT IN INTERVENTION

1.

This is a civil action by the State of Mississippi as Plaintiff-Intervenor in order to protect its interest as a major customer of the original Plaintiff, Mississippi Power & Light Company (MP&L) and, as *parens patriae*, to protect the interest of the citizens of the State of Mississippi. This Court has ancillary jurisdiction by virtue of the close relationship between Plaintiff-Intervenor's interest and those of the original Plaintiff in the main action.

2.

Plaintiff-Intervenor incorporates herein by reference the Complaint of Mississippi Power & Light Company

(MP&L) in the main action and adopts such Complaint in its entirety as its own, and as if fully set forth herein.

WHEREFORE, Plaintiff-Intervenor prays for such relief as requested by the original Plaintiff, Mississippi Power & Light Company (MP&L), in Counts Three and Four of its Complaint and for all costs of this action and all other relief to which the Plaintiff-Intervenor is entitled.

/s/ A. F. SUMMER
A. F. Summer, Attorney General
State of Mississippi

/s/ WILLIAM A. ALLAIN
William A. Allain
First Assistant Attorney General

/s/ MARSHALL G. BENNETT
Marshall G. Bennett
Assistant Attorney General

/s/ GILES W. BRYANT
Giles W. Bryant
Special Assistant Attorney General
Attorneys for Plaintiff-Intervenor,
State of Mississippi

APPENDIX J

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J74-185(C)

(Filed January 9, 1975)

MISSISSIPPI POWER & LIGHT COMPANY,
Plaintiff

vs.

UNITED GAS PIPE LINE COMPANY
and PENNZOIL COMPANY,
Defendants

MOTION TO DISMISS OR, ALTERNATIVELY, TO STAY

Comes now the defendants, United Gas Pipe Line Company, appearing through its undersigned counsel, and moves the Court to dismiss without prejudice the Complaint filed herein against it or, alternatively, to stay all further proceedings herein, on the ground that the Complaint presents numerous issues within the competence and primary jurisdiction of the Federal Power Commission for initial determination. Therefore, the Complaint herein should be dismissed without prejudice or, alternatively, all proceedings herein should be stayed, because primary jurisdiction over the subject matter is vested in and should be exercised by the Federal Power Commission.

WHEREFORE, defendant prays that the Complaint herein be dismissed without prejudice at plaintiff's cost or, alternatively, the proceedings herein stayed until further order of the Court.

DATED: January 9, 1975.

Respectfully submitted,

WILLIAM B. CASSIN
PHILLIP D. ENDOM
United Gas Pipe Line Company
1500 Southwest Tower
Houston, Texas 77002

W. DeVIER PIERSON
1054 Thirty-first Street, N.W.
Washington, D. C. 20007

E. L. BRUNINI
NEWT P. HARRISON
JOHN R. HUTCHERSON
1440 First National Bank Bldg.
Post Office Drawer 119
Jackson, Mississippi 39205
Telephone: (601) 948-3101

ATTORNEYS FOR
DEFENDANT, UNITED GAS
PIPE LINE COMPANY

By: /s/ E. L. BRUNINI
E. L. Brunini

OF COUNSEL:

BRUNINI, GRANTHAM, GROWER & HEWES
1440 First National Bank Bldg.
Post Office Drawer 119
Jackson, Mississippi 39205

SHARON, PIERSON, SEMMES, CROLIUS
AND FINLEY
1054 Thirty-first Street, N.W.
Washington, D. C. 20007

NOTICE OF MOTION

TO: HONORABLE SHERWOOD W. WISE
HONORABLE THOMAS G. LILLY
HONORABLE RICHARD B. WILSON, JR.
Post Office Box 651
925 Electric Building
Jackson, Mississippi 39205

HONORABLE CLAYTON L. ORN
122 Southwest Tower
Houston, Texas 77002

Please take notice that counsel for defendant, United Gas Pipe Line Company, will bring on for hearing the foregoing motion before the Court at the Federal Courthouse in Jackson, Mississippi, at 9:00 A.M., Central Time, on Friday, January 24, 1975, or as soon thereafter as counsel may be heard.

DATED: January 9, 1975.

/s/ EDMUND L. BRUNINI
Edmund L. Brunini

CERTIFICATE OF SERVICE

I hereby certify that I have mailed, by United States Mail first class postage prepaid, to Honorable Sherwood W. Wise, Honorable Thomas G. Lilly and Honorable Richard B. Wilson, Jr., Post Office Box 651, Jackson, Mississippi 39205, and to Honorable Clayton L. Orn, 122 Southwest Tower, Houston, Texas 77002, counsel for plaintiff, a true copy of the above and foregoing motion and notice of motion, this the 9th day of January, 1975.

/s/ EDMUND L. BRUNINI
Edmund L. Brunini

APPENDIX K

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J74-185(C)

(Filed January 9, 1975)

MISSISSIPPI POWER AND LIGHT COMPANY,
Plaintiff

vs.

UNITED GAS PIPE LINE COMPANY
AND PENNZOIL COMPANY
Defendants

MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY

Comes now Pennzoil Company, defendant herein, by its attorneys, and moves the Court to dismiss this cause, without prejudice, or, in the alternative, to stay all further proceedings in this cause until further orders of the Court, and in support of said motion, would respectfully show the following, to-wit:

1. As shown by the plaintiff's complaint, the principal issue in this case is a determination of the rights, duties and obligations of plaintiff and United, under the Gas

Sales Agreement, Exhibit "A" to the complaint, and Amendments thereto, Exhibits "B-G" to the complaint, in that United, an interstate gas pipeline regulated by the Federal Power Commission (FPC), has complied with FPC orders for the curtailment of deliveries of natural gas to plaintiff.

2. United's delivery obligations, and plaintiff's entitlement to receive deliveries of natural gas, are subject to and controlled by the Natural Gas Act, 15 U.S.C., §717, et seq., and to the control and regulations of the FPC.

3. Primary jurisdiction for consideration of the major issues raised by this case has, by federal law, been vested in the FPC. Further, the FPC has the initial and primary jurisdiction to consider in the first instance said major issues which are relevant in this case.

4. In view of the exclusive and original jurisdiction delegated by the Congress to the FPC to determine the curtailment authority of FPC with respect to deliveries of natural gas by United to its customers, including plaintiff, and the tariffs under which such deliveries shall be made, this Court lacks present jurisdiction over the subject matter of this action, and the plaintiff's complaint fails to state a claim, at this time, upon which relief may be granted.

WHEREFORE, Pennzoil Company, moves the Court to dismiss this cause, without prejudice, or, in the alternative, to stay all further proceedings in this cause until further orders of the Court.

Respectfully submitted,

PENNZOIL COMPANY

/s/ JOE H. DANIEL
JOE H. DANIEL
THOMAS A. BELL
P. O. Box 1084
Jackson Mississippi 39205

OF COUNSEL:

DANIEL, COKER, HORTON,
BELL AND DUKES

ALVIN W. OWSLEY
3000 One Shell Plaza
Houston, Texas 77002

BAKER & BOTTS

G. BRUCE MALLUM
Associate General Counsel
Pennzoil Company
900 Southwest Tower
Houston, Texas 77002

ATTORNEYS FOR PENNZOIL
COMPANY

NOTICE OF MOTION

TO: SHERWOOD W. WISE, ESQ.
THOMAS G. LILLY, ESQ.
RICHARD B. WILSON, JR., ESQ.
Post Office Box 651
Jackson, Mississippi 39205

CLAYTON L. ORN
122 Southwest Tower
Houston, Texas 77002

Please take notice that counsel for defendant, Pennzoil Company, will bring on for hearing the foregoing Motion to Dismiss, or, in the Alternative, to Stay, before this Honorable Court at the Federal Courthouse in Jackson, Mississippi, at 9 A.M., on the 24th day of January, 1975, or as soon thereafter as counsel may be heard.

This, the 9th day of January, 1975.

/s/ JOE H. DANIEL
Joe H. Daniel

CERTIFICATE OF SERVICE

I, Joe H. Daniel, attorney for defendant, Pennzoil Company, hereby certify that I have this day caused to be delivered to Sherwood W. Wise, Esq., Thomas G. Lilly, Esq., and Richard B. Wilson, Jr., Esq., counsel for plaintiff, a true and correct copy of the foregoing Motion to Dismiss, or, in the Alternative, to Stay, and Notice of Motion, and that I have this day mailed, by United States mail, first class postage prepaid, a true and correct copy of said Motion and Notice to Clayton L. Orn, Esq., 122 Southwest Tower, Houston, Texas 77002, and to E. L. Brunini, Esq., Post Office Drawer 119, Jackson, Mississippi 39205.

This, the 9th day of January, 1975.

/s/ JOE H. DANIEL
Joe H. Daniel

APPENDIX L

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTON NO. J74-185(C)

(Filed March 24, 1975)

MISSISSIPPI POWER & LIGHT COMPANY,
Plaintiff

vs.

UNITED GAS PIPE LINE COMPANY
and PENNZOIL COMPANY,
Defendants

SEPARATE ANSWER OF DEFENDANT UNITED GAS PIPE LINE COMPANY

Comes now UNITED GAS PIPE LINE COMPANY (hereinafter referred to as "United"), and for answer to the Complaint filed against it by MISSISSIPPI POWER & LIGHT COMPANY (hereinafter referred to as "MP&L"), responds as follows:

FIRST DEFENSE

The Complaint fails to state a claim against United upon which relief can be granted.

SECOND DEFENSE

The Federal Power Commission (hereinafter referred to as the "FPC") has primary jurisdiction over numerous

issues presented by the Complaint herein, which jurisdiction has not yet been fully exercised, and accordingly the Complaint should be dismissed without prejudice, or, alternatitvely, all proceedings herein should be stayed.

THIRD DEFENSE

Responding to and following the sequence or order of the numbered paragraphs of the Complaint herein, United answers and says:

1. United admits the allegations contained in Paragraph 1 of the Complaint.

2. United admits that MP&L is engaged in generating, transmitting and distributing electricity, principally in the western half of the State of Mississippi, but United is without knowledge or information sufficient to form a belief as to the precise number of retail customers and wholesale customers it serves, and therefore denies same. United admits it is engaged in transporting and selling natural gas. United admits that MP&L has purchased natural gas for use as a boiler fuel at its Rex Brown Steam Electric Station in Jackson, Mississippi, and its Baxter Wilson Steam Electric Station in Vicksburg, Mississippi, from United, and United denies all the remaining allegations contained in Paragraph 2.

3. United admits that on or about December 8, 1967, United and MP&L entered into a contract, denominated a Gas Sales Agreement, a copy of which is attached to the Complaint as Exhibit "A." United further admits that the Gas Sales Agreement was subsequently amended by United and MP&L, which amendments are attached to the Complaint as Exhibits "B," "C," "D," "E," "F," and

"G." United denies all of the remaining allegations contained in Paragraph 3 of the Complaint.

4. United denies all of the allegations contained in Paragraph 4 of the Complaint.

5. United denies all of the allegations contained in Paragraph 5 of the Complaint.

6. United denies all of the allegations contained in Paragraph 6 of the Complaint.

7. United denies all of the allegations contained in Paragraph 7 of the Complaint.

8. United admits that it was but is not now a wholly owned subsidiary of Defendant Pennzoil Company, and denies all of the other allegations contained in Paragraph 8 of the Complaint.

9. United admits that it was but is not now a wholly owned subsidiary of Defendant Pennzoil Company, and denies all of the other allegations contained in Paragraph 9 of the Complaint.

United denies that MP&L is entitled to any relief whatsoever against it.

FOURTH DEFENSE

10. United is a natural gas company within the meaning of Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b). MP&L is an electric utility subject to the jurisdiction of the FPC pursuant to the Federal Power Act, 16 U.S.C. § 791 *et seq.*, and MP&L is an industrial consumer of gas served directly by United.

11. The transportation of natural gas from United to MP&L, including the curtailment of deliveries which is

the subject matter of the Complaint herein, has been expressly held by the United States Supreme Court and other courts to be subject to the regulatory power of the FPC pursuant to the terms of the Natural Gas Act. 15 U.S.C. § 717(b); *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Mississippi Power & Light Co. v. FPC*, 476 F.2d 136 (5th Cir. 1973).

12. Pursuant to the terms of the Natural Gas Act, United is required to file with the FPC tariffs showing all classifications, practices, regulations and services affecting the transportation of natural gas to its customers, including MP&L. 15 U.S.C. § 717(c). Such tariffs control United's obligations, *inter alia*, with respect to the transportation of natural gas from United to its customers, including MP&L.

13. In 1954 United filed and the FPC placed into effect a tariff which provided in Section 12.1 as follows with respect to curtailment of natural gas deliveries to all United's customers:

> 12.1 *Proration of Impaired Deliveries*—Seller delivers gas to (a) gas utilities, and pipe line companies which deliver gas to gas utilities, for resale to domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its consumers, then, Seller may, *without liability to Buyer*, prorate its gas supply in the manner hereinafter set forth and first making allowance for all gas required by Seller for the operation of any of its facilities. The gas requirements of gas utilities, and pipe line companies delivering gas to gas utilities,

which sell gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the requirements of such gas utilities and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities, and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then there shall next be supplied the gas requirements of steam electric power plants using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their requirements from Seller or from gas utilities or from pipe line companies, purchasing their requirements from Seller; and, if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. After the above requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, to the extent of gas sold by them to their other consumers. In the event of any shortage of gas as in this Section provided, Buyer shall discontinue service of gas to its consumers during the period of any such shortage to the extent which may be necessary consistent to the provisions hereof.

In certain instances Seller supplies less than the full requirements of certain of its customers, and there may be times when Seller supplies less than the full requirements of Buyer hereunder and it is the intent of this Section that any priority granted hereunder shall run only to that part of the requirements of each ultimate consumer

> as is being currently supplied by gas furnished by Seller, directly or indirectly. (Emphasis added).

14. Factors beyond the control of the natural gas producing and transmission industries have caused a critical nationwide shortage of natural gas. Because of this shortage, United has been unable since November 1, 1970, to supply the full gas requirements of all its consumers.

15. During the period November 1, 1970 through November 13, 1971, United's curtailments of natural gas deliveries to its customers, including MP&L, were made pursuant to and in compliance with Section 12.1 of its tariff as set forth above in Paragraph 13.

16. In April, 1971, by its Order No. 431, 45 FPC 570 (1971), the FPC ordered United and similarly situated pipeline companies to file new tariff sheets setting forth proposed curtailment plans, declaring:

> Such tariffs, if approved by the Commission, will control in all respects notwithstanding inconsistent provisions in sales contracts, jurisdictional and non-jurisdictional, entered into prior to the date of the approval of the tariff. 45 FPC at 572.

17. In response to Order No. 431, on May 17, 1971, United filed various revisions to Section 12 of its FPC Gas Tariff which, with respect to Section 12.1, contained a new order of curtailment priorities and the following language:

> Whenever a shortage of natural gas impairs Seller's ability to fulfill the requirements of Seller's customers, then Seller may, *without liabilities to its cus-*

tomers, pro-rate Seller's supplies of natural gas [in the following priorities] . . . (Emphasis added.)

18. On May 28, 1971, the FPC suspended the effectiveness of the proposed tariff changes for one day and ordered the issues raised by the proposed changes consolidated for hearing and decision with pending proceedings concerning United's curtailment program.

19. On July 2, 1971, the FPC issued its "Order Authorizing and Directing Interim Enforcement of Curtailment Program Pending Final Determination of Issues," 46 FPC 21 (1971), in which United was ordered, *inter alia:*

> . . . to do and perform any and all acts which it deems reasonably necessary to enforce the terms and provisions of its Gas Tariff, including its curtailment program filed pursuant thereto. 46 FPC at 25.

20. On October 5, 1971, the FPC in Opinion No. 606, 46 FPC 786 (1971), modified the priorities in United's curtailment tariff and ordered United to file new tariff sheets reflecting these modifications and to curtail thereafter in accordance with the curtailment tariff, as modified. The portion of the tariff providing that United's curtailments were to be made "without liability to its customers" was, however, left unchanged by the FPC. During the period November 14, 1971 through January 16, 1973, United curtailed the deliveries to its customers, including MP&L, in accordance with FPC Opinion No. 606 and the curtailment tariff filed in compliance therewith.

21. On January 12, 1973, the FPC in Opinion No. 647, 49 FPC 179 (1973), again modified the priorities but not the "without liability" provision of United's curtail-

ment tariff, ordered United to file revised tariff sheets reflecting such modifications, and directed that United curtail thereafter in accordance with its curtailment tariff as modified. The major modification ordered by the FPC in Opinion No. 647 was the consolidation in the lowest curtailment category of all gas used for boiler fuel for the generation of electricity. As a result of the FPC's order, deliveries to United's power plant customers, including MP&L, have been substantially reduced since the effective date of the order.

22. By order issued March 7, 1975, the FPC reaffirmed that the changes in United's curtailment tariff ordered in Opinion No. 647 were necessary to prevent serious and irreparable harm resulting in plant closings, employee layoffs, and other forms of economic dislocation within United's service area, and expressly reaffirmed its elimination of the preference previously accorded electric utilities such as MP&L for gas used for domestic electric generation:

> We have taken a fresh look at the record in this case, and we remain convinced that it would have been unjust, unreasonable, and unduly discriminatory, within the meaning of Sections 4 and 5 of the Act, to continue the boiler fuel preference for domestic electric generation beyond the date of Opinion No. 647. The evidence in the original record confirms that, because of alternate fuel capability, there was no reason to afford superior status to utilities. (United Gas Pipe Line Co., Docket Nos. RP71-29 and RP71-120, "Order on Remand Denying Motion for Immediate Modification of Curtailment Plan," issued March 7, 1975 (Slip Op. p. 14).)

23. The FPC in its March 7, 1975, Order went on to review the record established since Opinion No. 647, which, the FPC found, revealed that the utilities' alternate fuel capability had been effectively relied upon since Opinion No. 647 and had been constantly improved. In reaching these conclusions, the FPC made clear that pipeline curtailments in accordance with these priorities would be required even though such curtailments would force electric utilities to use more costly alternative fuels:

> We recognize that the boiler fuel giants would prefer to use natural gas, rather than more expensive substitute fuels; however, as we stated in our November 12, 1974 order in this case (*Mimeo* at 6):
>
> > * * * [H]olding down fuel costs is not the focal point of our present concern; we are more concerned with the maintenance of essential industrial gas service which cannot withstand termination without severe economic disruption. (*Id.* at 21.)

24. The FPC in its March 7 order also remanded for initial decision by an administrative law judge (a) the necessity and propriety of adopting a tariff provision exculpating United from damage liability for curtailments and (b) all other issues relating to effectuation of a permanent curtailment plan on United's system.

25. From January 17, 1973, to date United has been curtailing natural gas deliveries to its customers, including MP&L, in accordance with the curtailment tariff ordered placed into effect by the FPC in Opinion No. 647 as reaffirmed on rehearing in Opinion No. 647-A, 49 FPC 1211 (1973), and in the FPC's March 7 order, set forth above in Paragraph 23.

26. Since November 1, 1970, United has been curtailing natural gas deliveries to its customers, including MP&L, pursuant to an effective tariff which has expressly stated that such curtailments are to be implemented "without liability" on the part of United to its customers. Such tariff provision controls United's delivery obligations to its curtailed customers such as MP&L, pursuant to the terms of the Natural Gas Act, and any imposition of liability upon United for such curtailments is consequently barred by the express provisions of the tariff as a matter of law.

FIFTH DEFENSE

27. United herein incorporates Paragraphs 10 through 25, of this Answer for the same purposes and to the same effect as if herein fully stated.

28. In the event of a shortage such as that which has occurred on United's system, the curtailment provisions of United's tariff and the curtailment orders of the FPC directing changes in that tariff, as set out in Paragraphs 18-25 above, control United's natural gas delivery obligations pursuant to the terms of the Natural Gas Act and decisions of the United States Supreme Court. Accordingly, the delivery duties and obligations imposed upon United by its contract with MP&L have been and remain modified, abrogated or overridden to the extent that they are inconsistent with United's duties and obligations under its tariff. Under this curtailment tariff and FPC orders, United's delivery obligation to MP&L since November 1, 1970, has been and remains the allotment to which MP&L is entitled under the tariff, which allotment MP&L has received and continues to receive pursuant to United's curtailment program as directed by the FPC. Consequently, no breach of contract has occurred.

SIXTH DEFENSE

29. United herein incorporates Paragraphs 10 through 25 of this Answer for the same purposes and to the same effect as if herein fully stated.

30. United further avers that since December, 1970, the FPC has conducted proceedings, to which MP&L has been a party since its intervention on December 10, 1970, on the justness and reasonableness of United's curtailments under the Natural Gas Act.

31. United further avers that one of the issues in the FPC curtailment proceedings was whether United's negligent or willful misconduct had created its shortage and its corresponding need to curtail.

32. In Opinion No. 606-A, the FPC expressly stated that whether United had improperly caused its shortage was an issue before it and on which it desired a preliminary decision by an administrative law judge.

> Louisiana asks that the proceedings be reopened for receipt of further evidence to determine whether United either deliberately or negligently brought its systemwide gas shortage upon itself. This question was already briefed by the parties and the question was remanded with other issues to the [administrative law judge] for his decision. 46 FPC 1290, 1293 (1971).

33. After the issue, *inter alia*, had been tried before and briefed to an FPC administrative law judge and to the FPC, the FPC held in Opinion No. 647 that

> . . . we fail to find any instances of deliberately discriminatory conduct on the part of United . . . .

> Moreover we are not persuaded by the arguments that United improvidently enlarged its service to certain customers and that it should therefore bear responsibility for the gas shortage on its system. 49 FPC 179 (1973).

34. These findings and conclusions were reaffirmed in Opinion No. 647-A, where the FPC held

> . . . that United has not been guilty of any improvidence or willful misconduct in its actions. The actions of United were those of reasonably prudent management faced with similar circumstances. 49 FPC 1211 (1973).

35. The issue of whether United's negligence or misconduct had created or aggravated its gas shortage was litigated in the curtailment proceedings. The FPC's findings were within its area of agency competence and expertise and such findings were essential to its determinations on the justness and reasonableness of United's curtailment program.

36. As a party to the curtailment proceedings, MP&L is barred by the Natural Gas Act and by the principles of collateral estoppel and *res judicata* from attacking or relitigating the FPC's findings and conclusions that United did not negligently or willfully create and did not misrepresent its gas shortage.

SEVENTH DEFENSE

37. United herein incorporates Paragraphs 10 through 25 of this Answer for the same purposes and to the same effect as if herein fully stated.

38. Article XVIII of the contract between MP&L and United, Exhibit "A" to the Complaint herein, provides as follows:

> This agreement is especially made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction.

39. On July 7, 1970, the FPC issued findings and an order in United Gas Pipe Line Company, Docket No. CP70-222, 44 FPC 14, certificating the sale of gas to MP&L at its Baxter Wilson Steam Electric Station and/or at its Rex Brown Steam Electric Station. Application for the order had been made by United at the instance of MP&L, and MP&L intervened in the FPC proceeding. Among other things, the FPC ordered the following:

> (A) A certificate of public convenience and necessity is issued authorizing Applicant, United Gas Pipe Line Company, to construct and operate the proposed facilities and to transport and deliver natural gas as hereinabove described, all as more fully described in the application in this proceeding, upon the terms and conditions of this order.
>
> (B) The certificate issued by paragraph (A) above and the rights granted thereunder are conditioned upon Applicant's compliance with all applicable Commission Regulations under the Natural Gas Act and particularly the general terms and conditions set forth in paragraphs (a), (c)(3), (c)(4), (e) and (f) of Section 157.20 of such Regulations.

40. At all times pertinent hereto, valid rules, regulations or orders of the FPC have required United to curtail deliveries of natural gas to MP&L, which curtailments are the subject matter of the Complaint herein. Article

XVIII of the contract and the July 7, 1970, order certificating transportation and delivery of gas under the contract expressly subordinate any inconsistent contract provisions to rules, regulations and orders of the FPC and render inconsistent contract provisions void and unenforceable to the extent that such provisions conflict with such rules, regulations and orders.

EIGHTH DEFENSE

41. United herein incorporates Paragraphs 10 through 25 of this Answer for the same purposes and to the same effect as if herein fully stated.

42. Article IX of the contract between MP&L and United, Exhibit "A" to the Complaint herein, entitled "Impairment of Deliveries," provided as follows:

IMPAIRMENT OF DELIVERIES

> Buyer specifically recognizes the fact that Seller delivers gas: (i) to gas utilities for resale to domestic consumers, and (ii) to public utility power plants for generation of electricty which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of (i) gas utilities selling gas to domestic consumers, and (ii) public utility power plants using gas for generation of electricity which is sold to domestic consumers, shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers.

43. To the extent that the provisions of Article IX have conflicted and will continue to conflict with the

curtailment provisions of United's effective tariffs, the tariff provisions control and the duties and obligations imposed upon United by the contract with respect to the transportation and curtailment of natural gas deliveries to MP&L have been and remain modified, abrogated or overridden to the extent that they are inconsistent with United's duties and obligations under its tariffs.

44. Consequently, at all pertinent times hereto, United's curtailments of deliveries to MP&L have been authorized by and have been effected in accordance with said Article IX as modified, abrogated or overridden by United's tariffs and FPC orders affecting those tariffs.

NINTH DEFENSE

45. United herein incorporates Paragraphs 10 through 25 of this Answer for the same purposes and to the same effect as if herein fully stated.

46. As a result of the foregoing, United's performance of its contract with MP&L is excused as a matter of law because of a subsequent change in the law, not within the contemplation of United and MP&L when the contract was entered into, whereby performance has become unlawful.

TENTH DEFENSE

47. United herein incorporates Paragraphs 10 through 25 of this Answer for the same purposes and to the same effect as if herein fully stated.

48. As a result of the foregoing, United's performance of its contractual delivery obligations to MP&L has been made impracticable by United's compliance in good faith

with applicable governmental regulations and orders, and such nonperformance therefore does not constitute a breach of United's duties under the contract pursuant to the law and public policy of the State of Mississippi, including *Miss. Code Ann.* § 75-2-615 (1972).

ELEVENTH DEFENSE

49. United herein incorporates Paragraphs 10 through 25 of this Answer for the same purposes and to the same effect as if herein fully stated.

50. United further avers that the national energy crisis, of which this Court may take judicial notice, has resulted in a shortage of natural gas available for purchase by natural gas transmission companies and thereby has seriously impeded the ability of such companies to fulfill their delivery obligations.

51. Pipelines normally do not have sufficient gas in inventory at a given time to meet the total requirements of their customers for the duration of their contracts with those customers. All pipelines, including United, have anticipated and relied upon the ability to acquire additional gas reserves on a continuing basis in order to meet their service obligations to their customers.

52. United consistently has made diligent efforts to secure gas supplies sufficient to meet the needs on its system. Indeed, United has engaged in one of the most intensive reserve acquisition programs in the history of the natural gas industry.

53. United's and other pipelines' ability to acquire additional gas reserves has become seriously impaired by unforeseeable governmental and regulatory actions beyond

United's control, including FPC pressures and encouragements upon United to reduce inventory levels and the environmental laws and regulations that have dramatically increased the demand for natural gas.

54. In addition United purchases its natural gas from independent and affiliated producers. The price at which such producers may sell natural gas to United and to other natural gas companies for resale in interstate commerce has, since 1954, been regulated by the FPC. *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672 (1954).

55. In exercising its authority to regulate producer prices, the FPC has established rates for natural gas considerably below its economic value as a fuel. These policies have discouraged producer efforts to find gas and have diverted substantial reserves of gas developed by new discoveries to intrastate markets. Since the price payable for gas by interstate pipelines and imposed by FPC orders is substantially below the price demanded by producers of intrastate gas, the price of which is not regulated by the FPC, the quantity of gas available to interstate pipelines has changed dramatically. MP&L has actively sought to obtain and has obtained gas in the intrastate market in Mississippi at prices in excess of those established by the FPC for interstate gas.

56. Despite United's efforts to obtain new gas supplies, it has been unable, owing, *inter alia,* to the aforementioned governmental and regulatory actions, to obtain newly committed reserves of sufficient quantity to satisfy the demands on its system. Consequently, to meet its service obligations, United has been forced to draw harder and harder on existing reserves which have suffered a marked and accelerating decline in deliverability.

57. As a result of the foregoing, United's performance of its contract with MP&L is excused as a matter of law because of a subsequent change in the law, not within the contemplation of United and MP&L when the contract was entered into, whereby United's ability to hold and to acquire gas supplies with which to perform the contract was and has been circumscribed by law and by governmental regulation.

TWELFTH DEFENSE

58. United herein incorporates Paragraph 49 through 56 of this Answer for the same purposes and to the same effect as if herein fully stated.

59. As a result of the foregoing, United's performance of its contract with MP&L is excused as a matter of law because of the destruction, from no default of either United or MP&L, of the specific thing, the continued existence of which was essential to the performance of the contract, which destruction was not within the contemplation of United and MP&L when the contract was entered into.

THIRTEENTH DEFENSE

60. United herein incorporates Paragraphs 49 through 56 of this Answer for the same purposes and to the same effect as if herein fully stated.

61. As a result of the foregoing, United's performance of its contractual delivery obligations to MP&L has been made impracticable by United's compliance in good faith with applicable governmental regulations and orders and such nonperformance therefore does not constitute a breach of United's duties under the contract pursuant to

the law and public policy of the State of Mississippi, including *Miss. Code Ann.* § 75-2-615 (1972).

FOURTEENTH DEFENSE

62. United herein incorporates Paragraph 49 through 56 of this Answer for the same purposes and to the same effect as if herein fully stated.

63. As a result of the foregoing, United's performance of its contractual delivery obligations to MP&L has been made impracticable by the occurrence of contingencies, the nonoccurrence of which was a basic assumption on which the contract was made, and such nonperformance therefore does not constitute a breach of United's duties under the contract pursuant to the law and public policy of the State of Mississippi, including *Miss. Code Ann.* § 75-2-615 (1972).

FIFTEENTH DEFENSE

64. United herein incorporates Paragraphs 10 through 25 and Paragraphs 49 through 56 of this Answer for the same purposes and to the same effect as if herein fully stated.

65. The term "force majeure" is defined by Article VIII of the contract between MP&L and United, as follows:

> The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to ma-

> chinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome; such term shall likewise include (a) in those instances where either Buyer or Seller is required to obtain servitudes, rights of way grants, permits or licenses to enable such a party to fulfill its obligations under this agreement, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost, and after the exercise of reasonable diligence, such servitudes, rights of way grants permits or licenses . . . .
>
> Limitations on Obligations—In the event of either Buyer or Seller being rendered unable wholly or in part by force majeure to carry out its obligations under this agreement, other than to make payments due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

66. The supervening governmental intervention and resulting unavailability of natural gas for the interstate market described above in Paragraphs 50 through 56 were "not within the control" of United nor preventable nor able to be overcome "by the exercise of due diligence"

on United's part. Moreover, the provisions of United's curtailment tariff and FPC orders affecting such tariff, set forth above at Paragraphs 10 through 25, have constituted "restraints of government" within the meaning of the term "force majeure" in Article VIII and have rendered United unable to acquire the governmental permission needed to deliver MP&L the full quantities of gas called for in its contract. Thus, at all times pertinent hereto, United has been rendered unable to carry out its full contractual delivery obligation with MP&L because of "force majeure" and United's obligation to deliver the gas provided for in the contract thus has been suspended pursuant to Article VIII of its Gas Sales Agreement with MP&L.

SIXTEENTH DEFENSE

67. Beginning in the summer of 1970, United warned MP&L of the worsening national natural gas supply situation and of the impending shortage on United's system. Subsequent to that time, MP&L has been periodically advised of United's supply situation and of the inadequacy of such supply to meet existing needs on United's system.

68. MP&L knew or should have known by 1971 of the growing scarcity and increasing costliness of energy sources, particularly fossil fuels. MP&L also knew or should have known that the encouragement of intrastate sales of natural gas generally was diverting gas from the interstate to the intrastate market and thus beyond the reach of United, and MP&L aided and abetted such diversion of gas by actively seeking to obtain gas in the intrastate market in Mississippi.

69. In fact MP&L conducted, along with other subsidiaries of Middle South Utilities, Inc., extensive and exhaustive studies of the total world prospect for energy, and despite such knowledge of the worsening energy shortage, MP&L unreasonably delayed its development of new sources of fuel.

70. Notwithstanding the above, from 1971 to the present, MP&L failed to take appropriate steps to reduce the use of electricity on its system. Rather, MP&L aggressively expanded its sales by promoting and encouraging the inefficient use of electric energy at rates which it knew or should have known were unreasonably low and could not have continued so, and added to the service commitments on its system, including acquisition of Capital Electric Power Association.

71. The damages sought by MP&L are grossly inflated and include alternate fuel costs, conversion costs, and the cost of so-called loss of capacity that United is under no obligation to pay, as well as monies which have been recovered by MP&L through its fuel cost adjustment provisions in its rate schedules. Such expenditures would have been necessary in any event as a result of the national gas shortage, the improvident use of natural gas as boiler fuel, the growth of MP&L's sales of electric energy, and the overriding interest of the public in environmental protection and in the end-use of natural gas.

72. MP&L could have purchased electricity from other electric utilities, Middle South Utilities, Inc., or other subsidiaries of Middle South Utilities, Inc., at a cost far below that of electricity generated by the burning of fuel oil purchased from independent third parties.

73. MP&L could have purchased fuel for the generation of electricity from other sources at a cost far below that of the fuel oil it has purchased for such generation.

74. As a result of the foregoing and in the event the issue of liability is decided against United, MP&L has failed to discharge its duty to reasonably mitigate its damages as much as practicable and cannot recover unnecessary damages from United.

SEVENTEENTH DEFENSE

75. Article XVI of the contract between United and MP&L provides for the limited payment under certain specified circumstances by United of the added costs of substitute fuels used by MP&L. Article XVI provides in relevant part as follows:

XVI.

USE OF SUBSTITUTE FUEL

It is recognized by Buyer that in the pipe line operations of Seller it is desirable to relieve as far as possible conditions which cause excessive or peak demands of gas, and it is recognized by Seller that in the plant operations of Buyer it is desirable to eliminate any shutdowns caused by the failure of the gas supply from whatsoever cause. Accordingly, in order to enable both Seller and Buyer to eliminate the above-described conditions, it is agreed that Buyer shall furnish or cause to be furnished at Buyer's sole cost and expense proper and adequate facilities (including oil storage tanks, fuel lines, oil meters and oil burning equipment) necessary to enable Buyer to use Number 2 grade fuel oil, to be purchased and supplied by Buyer in lieu of gas for Buyer's fuel requirements, up to the Maximum Daily Delivery Obligation then in effect, under the conditions

hereinafter set forth; and that payments with reference to such fuel oil so used by Buyer shall be made between the parties hereto on the basis of Bunker "C" grade fuel oil as hereinafter specifically provided. All fuel oil so used by Buyer for its fuel requirements shall be accurately metered by Buyer as it is used.

If so requested by Seller at any time and from time to time, Buyer agrees that it will use Number 2 grade fuel oil purchased and supplied by Buyer, as above set forth in lieu of gas for Buyer's fuel requirements hereunder during the period or periods of time so requested by Seller. In the event Seller is prohibited by governmental action or excused by reason of force majeure or proration of impaired deliveries from delivering gas to Buyer for Buyer's fuel requirements hereunder, up to the Maximum Daily Delivery Obligation then in effect, and Buyer uses Number 2 grade fuel oil for its fuel requirements, even though not so requested to do by Seller, during the period Seller is so prohibited or excused from delivering gas hereunder, all such fuel oil so used by Buyer during any period of not more than seven consecutive days shall be deemed to have been used by Buyer at Seller's request; provided, that during the time Seller is so prohibited or excused Seller shall have no obligation to pay for fuel oil used by Buyer after expiration of any such seven day period.

Payments with reference to fuel oil which is used by Buyer for its fuel requirements at Seller's request, up to the Maximum Daily Delivery Obligation then in effect, as provided in the next preceding paragraph, shall be made between the parties on the basis of Bunker "C" grade fuel oil as hereinafter set forth.

76. United has been required to curtail its gas deliveries to MP&L continuously during the period from

November 1, 1970 to date because of governmental action, force majeure, and proration of impaired deliveries pursuant to the Natural Gas Act. Under the provisions of Article XVI, therefore, United is liable for the excess cost of substitute fuel used by MP&L for not more than seven consecutive days during such period of continuous curtailment of deliveries, or from November 1 through November 7, 1970.

77. Under any other construction of the substitute fuel clause obligating United to pay for the excess cost of substitute fuel used by MP&L as a result of the curtailments for a period of more than seven consecutive days, such clause would be preferential and discriminatory as prohibited by Section 4 of the Natural Gas Act, 15 U.S.C. § 717(c).

EIGHTEENTH DEFENSE

78. United herein incorporates Paragraphs 75 and 76 of the Answer for the same purposes and to the same effect as if herein fully stated.

79. MP&L has created a complex system of interconnections between its generating stations and with its affiliated companies which permits it to maneuver its fuel and electric generation requirements in a multitude of ways. MP&L also has electricity swapping arrangements with the Tennessee Valley Authority and other electric utilities.

80. MP&L has erroneously interpreted the substitute fuel clause to require payments from United for the excess cost of substitute fuel during numerous periods of not more than seven consecutive days and has manipulated

its inter-connections and swapping arrangements to conform to and to maximize its substitute fuel claims. MP&L has thereby failed to perform its contract with United in good faith, as required by the law and public policy of the State of Mississippi, including *Miss. Code Ann* § 75-1-203 (1972), and is prevented from enforcing its contrived substitute fuel claims.

NINETEENTH DEFENSE

81. United herein incorporates Paragraphs 49 through 56 of this Answer for the same purposes and to the same effect as if herein fully stated.

82. United is a regulated natural gas company rendering natural gas service to five interstate pipelines, 112 city gate distribution systems, and over 200 direct industrial customers.

83. MP&L uses the gas supplied by United primarily for use in firing boilers. Such boiler fuel use has been held by the FPC and the courts to be a use inferior to the use of gas for residential, process, and certain direct fire uses.

84. Owing to such inferiority, the use of gas for boiler fuel has consistently been accorded the lowest curtailment priority in United's tariffs and its contracts. In times of gas shortage, the public interest requires that gas be utilized in the most equitable and efficient manner.

85. Pursuant to the provisions of Section 4 of the Natural Gas Act, 15 U.S.C. § 717(c), United is prohibited from granting any person any undue preference or advantage or from subjecting any person to any undue prejudice or disadvantage. United is also barred from

maintaining any unreasonable difference in any respect with respect to the transportation of gas to its customers, including MP&L.

86. Any recovery of damages against United in this proceeding would unlawfully and inequitably compensate MP&L for curtailments of natural gas deliveries made in accordance with the Natural Gas Act and would constitute an undue preference and discrimination in favor of MP&L and in violation of the Natural Gas Act.

TWENTIETH DEFENSE

87. United herein incorporates Paragraphs 81 through 85 of this Answer for the same purposes and to the same effect as if herein fully stated.

88. If the contract between United and MP&L absolutely requires the delivery and sale of gas for use as boiler fuel in times of natural gas shortage, the contract violates the laws of the United States and contravenes the public policy as expressed by law and is therefore unenforceable.

TWENTY-FIRST DEFENSE

89. Any recovery of damages against United in these proceedings would constitute an undue burden on interstate commerce and violate the Commerce Clause of the United States Constitution.

TWENTY-SECOND DEFENSE

90. United herein incorporates Paragraphs 49 through 56 of this Answer for the same purposes and to the same effect as if herein fully stated.

91. The gas shortage on United's system and United's consequent inability to meet the gas requirements of all its customers is an extraordinary phenomenon outside the expectation or control of United or its consumers and has imposed burdens on both United and its consumers.

92. The imposition of liability upon United for its curtailments of natural gas deliveries to MP&L and the awarding of damages as sought by MP&L would impose the entire cost burden of United's shortage upon United. Such a result would disregard the nature of the shortage, the burden already shouldered by United, and would be wholly unfair and inequitable.

WHEREFORE, United demands judgment that the Complaint herein be dismissed with prejudice at MP&L's cost.

DATED: March 24, 1975.

Respectfully submitted,

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CERTIFICATE

I, E. L. BRUNINI, an attorney for Defendant United Gas Pipe Line Company, hereby certify that I have this day hand delivered a true and correct copy of the foregoing Separate Answer of Defendant United Gas Pipe Line Company to Honorable Sherwood W. Wise, Honorable Thomas G. Lilly, and Honorable Richard B. Wilson, Jr., Post Office Box 641, Suite 925, Electric Building, Jackson, Mississippi 39205, to Honorable Giles W. Bryant, II, Special Assistant Attorney General, Gartin Building, Post Office Box 220, Jackson, Mississippi 39205, and to Honorable Joe H. Daniel and Honorable Thomas A. Bell, Post Office Box 1084, Jackson Mississippi 39205, and that I have this day mailed by United States Mail, First Class Postage Prepaid, a true and correct copy of the said Separate Answer to Honorable Clayton L. Orn, 122 Southwest Tower, Houston, Texas 77002, Honorable Alvin M. Owsley, Jr., Honorable Daryl Bristow, and Honorable Stephen C. Hackerman, 3000 One Shell Plaza, Houston, Texas 77002, and to Honorable G. Bruce Mallum, 900 Southwest Tower, Houston, Texas 77002.

THIS 24th day of March, 1975.

/s/ E. L. BRUNINI
E. L. Brunini

APPENDIX M

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J74-185(C)

(Filed March 24, 1975)

MISSISSIPPI POWER & LIGHT COMPANY,
Plaintiff

vs.

UNITED GAS PIPE LINE COMPANY
AND PENNZOIL COMPANY,
Defendants

SEPARATE ANSWER AND DEFENSES OF PENNZOIL COMPANY

COMES NOW Pennzoil Company, and, subject to and without waiving its Motion to Dismiss, or, in the Alternative, to Stay, heretofore filed in this cause, and filing its Answer and Defenses pursuant to directions from the Court during oral argument of the aforesaid motion, as confirmed by order of the Court dated March 18, 1975, does hereby answer and defend the Complaint filed against it by Mississippi Power & Light Company (hereinafter referred to as "MP&L"), as follows:

FIRST DEFENSE

1.

At all times material to the MP&L claim the gas

delivery obligations of United Gas Pipe Line Company (hereinafter referred to as "United") to MP&L have been governed by the provisions of a validly filed and effective Federal Power Commission (FPC) Gas Tariff, containing a provision which absolves United from all liability for any reduction of gas deliveries effected in accordance with the tariff. This action constitutes a collateral attack on said tariff over which this Court has no subject matter jurisdiction.

SECOND DEFENSE

2.

The issues raised by the MP&L Complaint are, by virtue of the Natural Gas Act, 15 U.S.C. Sections 717 et seq., within the primary jurisdiction of the FPC. The FPC actively has had and presently has under consideration the matters placed in controversy by MP&L in this action.

THIRD DEFENSE

3.

The Complaint fails to state a claim against Pennzoil upon which relief can be granted.

FOURTH DEFENSE

4.

Further answering the Complaint, Pennzoil would show, as follows:

5.

Pennzoil admits the allegations of paragraph 1 of the Complaint.

6.

Pennzoil admits the following allegations of paragraph 2 of the Complaint:

(a) MP&L is engaged in generating, transmitting and distributing electricity, principally in the western half of the State of Mississippi;

(b) United is engaged in transporting and selling natural gas in interstate commerce;

(c) MP&L has purchased natural gas from United for use as boiler fuel at its Rex Brown Steam Electric Station in Jackson, Mississippi, and at its Baxter Wilson Steam Electric Station in Vicksburg, Mississippi.

Pennzoil is without knowledge or information sufficient to know and accordingly denies the allegation as to the number of retail and wholesale customers which MP&L serves. Pennzoil denies the remaining allegations of paragraph 2.

7.

Pennzoil admits that United and MP&L entered into the written agreements attached to the Complaint as Exhibits "A" through "G" and referred to in paragraph 3. Pennzoil denies the remaining allegations of paragraph 3 of the Complaint.

8.

Pennzoil denies the allegations of paragraph 4 of the Complaint.

9.

Pennzoil denies the allegations of paragraph 5 of the Complaint.

10.

Pennzoil denies the allegations of paragraph 6 of the Complaint.

11.

Pennzoil denies the allegations of paragraph 7 of the Complaint.

12.

With regard to the allegations of paragraph 8 of the Complaint, Pennzoil admits that United at one time was a wholly-owned subsidiary of Pennzoil. The remaining allegations of paragraph 8 are denied.

13.

As qualified by the allegations of paragraph 12 of this answer, Pennzoil denies the allegations of paragraph 9 of the Complaint.

FIFTH DEFENSE

14.

The Gas Sales Agreement and Amendments attached to the Complaint herein are and at all material times have been subject to the paramount power of the FPC to modify or supersede the said contracts when such action is called for to protect or further the public interest.

15.

With regard to said Agreement and Amendments attached to the Complaint herein, the FPC, beginning in 1971, in the discharge of its responsibility to protect the

public interest, has restructured United's gas delivery obligations to MP&L, and United has fully complied with its gas delivery obligations to MP&L, as restructured by the FPC. Thus, United is not liable to MP&L, and Pennzoil cannot be liable, for the reduced gas deliveries complained of in the Complaint.

SIXTH DEFENSE

16.

Beginning in 1971, in response to the existence of an industry-wide natural gas shortage, the FPC ordered pipeline companies subject to its jurisdiction, including United, to file tariff's provisions so that the FPC could control the curtailment of gas deliveries to United's customers, including MP&L.

17.

Accordingly, in 1971, the FPC approved a curtailment plan for United which established an order of priorities for curtailment and provided that United in times of shortage was to pro-rate its supplies of gas in accordance with the established and FPC-approved priorities, and "without liability" to its customers. Subsequently, again in furtherance of the public interest, the FPC changed the order of priorities for curtailment, but the "without liability" provision of United's tariff, which provision has been an effective provision of the tariff since 1954, was allowed to remain effective and essentially unchanged and has gone unchallenged since then.

18.

The "without liability" provision of United's tariff has been declared by the FPC to apply to and control the

contract delivery obligations of United including those referred to in the Complaint. Any reduction of gas deliveries by United to MP&L has been pursuant to and in accordance with its FPC-approved curtailment plan, and by virtue of the specific provisions of that plan, the FPC has eliminated damage liability exposure for compliance with its curtailment orders. Thus, United is not liable to MP&L, and Pennzoil cannot be liable, for any such reduction in deliveries.

SEVENTH DEFENSE

19.

MP&L has heretofore intervened and actively participated in the FPC proceedings concerning United's gas deliveries, has come under the jurisdiction of the FPC, and is bound by its findings and orders which eliminate any liability on the part of United for reduction in gas deliveries. Thus, Pennzoil can have no liability.

EIGHTH DEFENSE

20.

The curtailment by United of gas deliveries to its customers, including MP&L, has been occasioned by a critical and nationwide natural gas shortage. The nationwide shortage, and the resulting shortage on United's pipeline system, is an occurrence which neither Pennzoil nor United caused and over which neither had any control. Accordingly, neither Pennzoil nor United may be held accountable for consequential damages, if any, which MP&L may have suffered as a result of the shortage.

NINTH DEFENSE

21.

To the extent that United has delivered gas to MP&L in lesser quantities than those specifically called for by its contracts with MP&L, it has done so pursuant to the provisions in the contracts concerning (1) subordination of the obligations of the parties to orders of regulatory authorities having jurisdiction; (2) impairment of deliveries; (3) force majeure; and (4) use of substitute fuels. Accordingly, such reductions in deliveries do not amount to breach of contract.

TENTH DEFENSE

22.

To the extent that United has delivered gas to MP&L in lesser quantities than those called for by its contracts with MP&L, such reduction was and is the result of United's mandatory compliance with valid orders of the FPC. Accordingly, United is excused under applicable principles of law from any failure to deliver greater quantities of gas, since United's performance has been rendered impossible because of compliance in good faith with said governmental regulations and orders. Therefore, United is not liable to MP&L, and Pennzoil cannot be liable, for any such reduction in deliveries.

ELEVENTH DEFENSE

23.

Pennzoil is not a party to any contract on which this suit is brought, has no privity of contract with MP&L, and

cannot legally be responsible to MP&L for any alleged breach thereof.

24.

Pennzoil is a wholly separate and distinct corporate entity from United, and has operated as a separate entity at all relevant times. Pennzoil has never exercised any unlawful or improper control over United and has never followed any policy or committed any acts to the detriment of United.

25.

Pennzoil alleges that United owes no damages to MP&L for nonperformance of the above mentioned contracts, for the reasons more fully set forth in United's Answer. However, even if it should be determined that damages are owed by United to MP&L, Pennzoil can have no legal responsibility for any portion of such damages, it having no responsibility for the legal liability, contractural or otherwise, of United.

TWELFTH DEFENSE

26.

During and prior to 1970, MP&L knew of the existence of the nationwide gas shortage, and, as time has passed since, it has been aware of the increasing nature of the shortage. More specifically, before execution of the March 12, 1970, Gas Purchase Agreement between United and MP&L, it was aware of the possibility of gas curtailment by United because of the shortage, and cannot now, with clean hands, complain of curtailment or FPC regulation of gas deliveries.

27.

Since 1970, MP&L has been an active party in proceedings before the FPC, wherein the FPC has determined that the public interest dictated a low priority for the use of natural gas to fuel boilers for the creation of steam, which is MP&L's principal use of natural gas.

28.

Despite the very clear indication to MP&L of the direction the natural gas shortage was taking, and of FPC policies for dealing with the shortage, MP&L failed to take such measures as were reasonably dictated by the circumstances to minimize the adverse effects of the shortage on its operations and on its customers.

29.

Instead, MP&L has, since the early days of the curtailment, continued an intensive campaign to increase both the number of customers and the amount of electricity used by such customers. For example, on or about March 31, 1973, MP&L paid $10,500,000.00, subject to minor adjustments, to acquire the assets of Capital Electric Power Association, and thus the members (customers) of said Association, totaling nearly 16,000 in number, composed of all types of users of electricity from small residential customers to large industrial users. By its action in so doing, MP&L has not only failed to mitigate its damages, but, to the contrary, has purposely acquired new customers, necessitating additional purchases of higher priced alternate fuels for the generation of electricity or the purchase of additional higher priced electricity from others.

30.

As MP&L continued the expansion of its service and facilities and continued to ignore the realities of the gas shortage, it did so with full knowledge that it would in all likelihood pass through to its customers the additional costs which were thus imposed upon its system, and with knowledge that the net result would be an increased cost to its customers, not MP&L itself, and substantially increased revenues for MP&L.

31.

MP&L, by its planning and promotion policies, with regard to expansion of its facilities and electric service, unreasonably aggravated its need to rely upon substitute fuels for the generation of electricity to the detriment of its customers. Additionally, it has purchased alternate fuel from companies owned by it, or by it and other subsidiaries of its parent company, Middle South Utilities, Inc., and has purchased electricity from said subsidiaries, at unreasonable prices, to the detriment of its customers, and to the financial advantage of MP&L and its parent company, Middle South Utilities, Inc.

32.

In taking these actions in the face of the growing nationwide gas shortage, MP&L, individually or in combination with its parent company, Middle South Utilities, Inc., and other electric utilities owned by Middle South, has acted contrary to the best interests of its customers and contrary to sound business practices, in order to enhance its own profits, as well as the profits of the Middle South Group. Neither Pennzoil nor United may be held responsible for the aforesaid actions of MP&L.

WHEREFORE, Pennzoil denies that the plaintiff, MP&L, is entitled to recover any amounts whatsoever from Pennzoil, who prays that the Complaint be dismissed, at the cost of the plaintiff.

Respectfully submitted,

PENNZOIL COMPANY

By /s/ JOE H. DANIEL
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CERTIFICATE OF SERVICE

I, Joe H. Daniel, attorney for defendant, Pennzoil Company, hereby certify that I have this day caused to be delivered to Sherwood W. Wise, Esq., Thomas G. Lilly, Esq., and Richard B. Wilson, Jr., Esq., counsel for plaintiff, a true and correct copy of the foregoing Separate Answer and Defenses of Pennzoil Company, and that I have this day mailed, by United States mail, first class postage prepaid, a true and correct copy of said Separate Answer and Defense to Clayton L. Orn, Esq., 122 Southwest Tower, Houston, Texas 77002, and to E. L. Brunini, Esq., Post Office Drawer 119, Jackson, Mississippi 39205.

THIS, the 24th day of March, 1975.

/s/ JOE H. DANIEL
Joe H. Daniel

APPENDIX N

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; William L. Springer and Don S. Smith

UNITED GAS PIPE LINE COMPANY

Docket Nos. RP71-29, et al. (Phase III), RP75-71

UNITED GAS PIPE LINE COMPANY

Docket No. RP75-69

Order Partially Granting Petition for Declaratory Order and Motion to Consolidate

(Issued August 20, 1975)

The U.S. Court of Appeals for the Fifth Circuit, *inter alia*, vacated those portions of Opinion Nos. 647 and 647-A which interpreted United Gas Pipe Line Company's ("United") contracts and assessed potential liability, *State of Louisiana, et al. v. F.P.C.* 503 F.2d 844, 868 (5th Cir. 1974). The Court viewed these portions of our opinions as "an arguably premature determination of United's contract liability via the doctrine of collateral estoppel" (503 F.2d at 867). In framing the proper inquiry on remand the court said that the Commission "should evaluate Section 12.3 [a tariff provision purporting to remove contractual liability] on the assumption that United faces possible liability—not on the assumption it is immune" (503 F.2d at 867-868).

Our orders issued March 7, April 2 and May 2, 1975, separated into a Phase III of the remanded proceeding the issues raised in the court's analysis with regard to United contracts and liability and consolidated these issues with a consideration of Section 12.3 of United's proposed tariff filed on March 3, 1975, in Docket No. RP75-71.[1]

On March 3, 1975, United filed a petition requesting that we issue declaratory orders directed to the issues contained in the following items:

> "1. Whether, in view of the present dimensions of the natural gas shortage and the corresponding level of Commission-directed curtailments, the payment of damages or compensation to some of United's customers as a result of United's inability to meet its customers' delivery requirements would create undue preferences and discriminations among customers, would impair United's ability to meet its obligations under the Natural Gas Act, would otherwise be contrary to the public interest, and, accordingly, should be prohibited?
>
> 2. Whether Section 12.1 of United's currently-effective tariff, which provides that curtailments by United during a gas shortage are to be made 'without liability to its customers,' precludes damage claims by United's direct sale customers based on curtailments effectuated in response to the present natural gas shortage?
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> 3. Whether the shortage necessitating United's curtailments was caused by negligent or willful misconduct on United's part, taking into account, among other factors, United's obligations under the Natural Gas Act and the Commission's regulations and orders,

1. Amended and redesignated 12.4 in new tariff sheets, as indicated in our order issued April 2, 1975.

Commission and other federal action affecting natural gas supply and demand, and industry practice with respect to acquisition, storage and sale of natural gas?

4. Whether the rights of United's customers whose service was at one time in whole or in part intrastate are also fixed by United's curtailment tariffs and Commission orders and whether the payment of curtailment damages or compensation to such customers would create undue preferences and discrimination?"

United requests that we assert primary jurisdiction to decide the foregoing issues and publish declaratory orders which would be determinative for purposes of suits, brought in state and federal courts by United's customers seeking damages based on curtailment.

On May 20, 1975, United filed a motion to consolidate the petition for declaratory order with the proceedings in Phase III of Docket Nos. RP71-29, *et al.*

At this point, we do not believe our responsibility to act in Phase III extends further than to respond to the issues raised by the court and to determine whether it is necessary and proper to approve Section 12.3 as proposed in Docket No. RP75-71. Our response to United's petition must be within this framework.

The court asked us to consider the effect of Section 12.3 on United's possible contractual liability. United, however, might be found liable for damages arising out of curtailment under two distinct bases. It might be liable under a general breach of contract theory ("general liability"). Even if not generally liable, it might still be liable for breach of its special obligations created by substitute fuel clauses with certain customers ("special

liability"). Liability arising from curtailment and the need to burn substitute fuels could arise under either of these bases (503 F.2d at 864). Section 12.3, if it has any effect on possible contractual liability, could affect either form of liability. In addition to Section 12.3, Section 12.1 purports to limit United's general contract liability. Whether Section 12.1 does limit general liability would, therefore, appear to be an appropriate corollary issue to be addressed in Phase III. In this regard we note that, in addition to asking the Commission to evaluate Section 12.3, the court posed the more general question: "Can a tariff provision remove general contractual liability?" (503 F.2d at 867).

The court postulated a second central question regarding general liability which should be considered in Phase III: "If the [tariff] provision would remove liability, would the unavailability of damages subject United's curtailed customers to 'any undue prejudice or disadvantage?'" (503 F.2d at 867). In items 1 and 4, above, United requests a declaratory order addressed to the issue of whether the payment of damages or compensation to its customers, including formerly intrastate customers, would create undue preferences and discriminations among customers? Although the questions raised by the court and United are phrased in terms of "undue prejudice or disadvantage," the questions posed are quite different. It may be appropriate for this Commission to speak to United's questions as to preference and discrimination arising out of satisfaction of a judgment for curtailment-produced damages, but the question is premature since it can only arise in the event that Sections 12.1 and 12.3 do not limit United's liability.

By requesting a declaratory order as to item 3, above, United seeks reaffirmation of our finding in Opinion Nos. 647 and 647-A that its curtailments did not result from improvidence or willfull misconduct. The basis for the allegation of improvidence or willfull misconduct is the contention that United engaged in enlargement of existing service and assumption of new service at a time when it knew or should have known that it would soon experience systemwide shortages. This issue of United's improvidence or willful misconduct has a dual relevance: (1) it may affect United's contractual liability and (2) it may affect any permanent curtailment plan to the extent that "United's past curtailment actions have created undue preferences which are perpetuated by that plan" (503 F.2d at 877). With respect to this latter effect, an opportunity to review evidence, if any, heretofore not presented concerning United's alleged wrongful expansion of service will be afforded in Phase II in the context of the structuring of a permanent plan free from undue preferences and discriminations. In light of the court's statement that we should not further speak to the issue of United's liability in this proceeding,[2] we believe that the issue of wrongful expansion of service should not be further reexamined in Phase III.

In the first part of item 4, above, United poses an issue which is too broad for us to fully answer in the context of the present proceeding: Whether the rights of United's customers whose service was at one time in whole or in part intrastate are also fixed by United's curtailment tariff and Commission orders? In its petition, United indicates that those formerly intrastate customers are served

2. 503 F.2d at 866 n. 51.

by United's "Green" and "Purple" systems over which we have been determined to have jurisdiction,[3] and which we certificated in Opinion No. 661.[4]

The "fixing" of "rights" of individual customers, formerly served from nonjurisdictional facilities, subsequent to the change in service to an interstate character may depend on a number of factors. Prior to the change from intrastate character or service, the rights between United and the customers in question were "fixed" variously by service agreements, tariff provisions filed with state, or local regulatory authorities, and state law and regulations. When the character of service changed and interstate jurisdiction attached, these provisions were supplanted to the extent they conflicted with the provisions of United's FPC tariff provisions prescribing curtailment procedures. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Pennsylvania v. West Virgina*, 262 U.S. 553 (1923). Such result stemmed from our action pursuant to our jurisdiction over transportation, and not from a unilateral contract modification by United. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 646 (1972). United's effective FPC general tariff determined curtailment procedures for both direct sales and resale sales. *Id.* at 647. Any exculpatory provisions contained in United's tariff are an integral part of the curtailment program which we have approved as just and reasonable applicable to the transportation of natural gas by United subject to our jurisdiction (503 F.2d at 867). When ser-

3. *Louisiana Power & Light Co. v. F.P.C.*, 483 F.2d 623 (5th Cir. 1973), *cert. denied*, U.S. (1974).

4. 50 F.P.C. 181 (1973); *appeals pending sub nom., State of Louisiana, et al. v. F.P.C.* (D.C. Cir. No. 73-1994) and *International Paper Co. v. F.P.C.* (D.C. Cir. No. 73-2146).

vice to formerly intrastate customers became interstate, exculpatory language contained in United's then effective tariff became fully applicable to such customers.

We decline to opine further as to the "fixing" of "rights" by United's tariffs since, first, a determination of rights does not appear necessary to resolve the issues raised by the court on remand or by United's filing in Docket No. RP75-71. Secondly, without expressing our views concerning under what conditions jurisdictional companies' rights provided by their FPC tariffs may be altered by pre-jurisdictional contracts, we note that United might have attempted to contract away defenses which could otherwise be applicable. Whether such an attempt was made is unknown at this point. Lastly, until a determination is reached concerning the necessity and propriety of making Section 12.3, as originally proposed, retroactively applicable, the extent of the "fixing" of "rights" of formerly intrastate customers by United's tariff remain contingent.

The Commission finds and orders:

Good cause has not been shown for granting United's petition for declaratory order and motion to consolidate, except as to the consolidation of the issue of the effect of United's tariff Section 12.1 on its general liability to curtailed direct sales customers. Such issue shall be consolidated for consideration in Phase III.

By the Commission.

[Seal]

Kenneth F. Plumb,
Secretary.

APPENDIX O

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 76-3914, 76-3971,
76-3990 and
76-3991

(Filed November 13, 1976)

SOUTHERN NATURAL GAS COMPANY,
CONSOLIDATED GAS SUPPLY CORPORATION,
LACLEDE GAS COMPANY, and
TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petitions for Review of Orders
of the Federal Power Commission
Alabama and Texas Cases

Before CLARK, RONEY and TJOFLAT, Circuit Judges.

BY THE COURT:

The petition of Southern Natural Gas Company in cause number 76-3914 seeks review of Federal Power

Commission orders dated May 28 and September 14, 1976 relating to the implementation of a curtailment plan for the equitable distribution of an inadequate supply of natural gas on the United Gas Pipe Line Co. system. The Court *sua sponte* issued an order to the Federal Power Commission and United Gas Pipe Line Company on October 29, 1976, requiring them to show cause on November 5, 1976, why the Court should not enforce its mandate issued February 5, 1976 in Louisiana Power and Light Co. v. F.P.C., 526 F.2d 898. That show cause hearing having been duly held, the Court enters the following findings and conclusions:

FINDINGS

1. In Order No. 431, 45 FPC 570 (1971), the Federal Power Commission (Commission) directed natural gas companies subject to its jurisdiction which expected to curtail deliveries to either file a curtailment plan with the Commission, or state that their existing curtailment plans were adequate. United Gas Pipe Line Company (United) filed a proposed five category curtailment plan on May 17, 1971.

2. On October 5, 1971, the Commission issued Opinion No. 606, 46 FPC 786. That opinion rejected Category V of United's five-priority plan which comprised customers who were paying a comparatively low rate for their gas. Additionally, the Commission ordered United to file new tariff sheets containing a four-priority plan to be used on an interim basis pending hearing on its merits as a permanent plan. The four-priority plan filed by United contained the following four categories:

I. Gas ultimately used by domestic customers;

II. Gas used by direct industrial customers for feedstock purposes;

III. Gas used to generate electricity which is consumed by domestic customers; and

IV. Gas used for all other industrial purposes.

The Commission accepted the revised tariff sheets but deferred any ruling upon the justness and reasonableness of the four-priority plan. That plan remained in effect from November 14, 1971, until the issuance of Opinion No. 647, 49 FPC 179 (1973).

3. In Opinion No. 647, issued January 12, 1973, the Commission, *inter alia*, determined that United's past curtailment practices, including the four-priority plan, were just and reasonable during the periods that they had been in effect (49 FPC at 195). However, for future curtailment United was ordered to immediately consolidate priorities III and IV of the interim four-priority plan pending the implementation of a new permanent plan.

4. On November 8, 1974, this Court issued its decision in *State of Louisiana, et al. v. F.P.C.*, 503 F.2d 844, vacating and remanding Opinion Nos. 647 and 647-A.

5. On March 7, 1975, the Commission issued an order on remand from *State of Louisiana, supra*, in which it determined that the four-priority plan was just, reasonable and non-discriminatory prior to Opinion No. 647, but that "it would have been unjust and unreasonable and unduly discriminatory, within the meaning of Sections 4 and 5 of the Act, to continue the boiler fuel preference for domestic electric generation beyond the date of Opinion

No. 647." The Commission ordered United to "continue curtailment under the three category interim plan in the manner prescribed by Opinion Nos. 647 and 647-A, until further order of the Commission."

6. On October 31, 1975, the Commission issued an order approving a one year settlement between the parties in the United docket.

7. On February 5, 1976, in *Louisiana Power & Light Co. v. F.P.C.*, 526 F.2d 898, the Court found that while the Commission's findings on the alternate fuel capability of boiler fuel users were supported by substantial record evidence, its findings on the irreparable harm to United's direct market industrial customers which would result from the implementation of the four-priority plan were not supported by record evidence. This Court stated (526 F.2d at 911):

> * * * [T]his is the last year during which the three-priority plan will remain in operation without the support of a proper finding on the invalidity of the four-priority plan. Absent proper compliance by the Commission with our decision on remand, the four-priority plan will control curtailment on the United system for the 1976-77 winter heating season.

8. On April 1, 1976, United, acting in accordance with the Commission approved settlement of October 31, 1975 filed revised tariff sheets containing a proposed permanent curtailment plan.

9. On May 28, 1976, the Commission accepted United's April 1, 1976 filing as of June 1, 1976, but suspended the tariff for the maximum five-month period so as to cause such tariff to become effective November

1, 1976, the date of the beginning of the 1976-77 winter heating season.

10. On September 14, 1976, the Commission denied rehearing of its May 25, 1976 order.

11. On October 28, 1976, United moved to make its filing effective.

12. Curtailment under United's tariff filing is inconsistent with the provisions of the four-priority plan.

13. Since the remand of *Louisiana Power & Light Co.* (¶7, *supra*) the Commission has not made "a proper finding on the invalidity of the four-priority plan."

14. Neither the Commission, United, nor any party affected by this Court's mandate of February 5, 1976 or by United's tariff filing has advised this Court of the direct conflict between the mandate and United's tariff created by the Commission's inactions or sought modification of, or relief from, the Court's mandate prior to the commencement of the 1976-77 winter heating season.

CONCLUSIONS

1. This Court has jurisdiction to make this order under its inherent power to enforce the mandate in *Louisiana Power & Light Co. v. F.P.C.*, 526 F.2d 898 (1976).

2. That mandate is clear and unambiguous. In the absence of a proper commission finding on the invalidity of the four-priority plan, the four-priority plan controls curtailment on United's system for the 1976-77 winter heating season.

3. The Court in *Louisiana Power & Light Co. v. F.P.C.* determined that the Commission had sufficient evi-

dence on the alternate fuel capability of electric utilities to justify the subordination of boiler fuel, as an inferior use in United's curtailment plan.

4. Neither the Court nor the Commission has an adequate record basis to adjudicate the priority entitlement, if any, of the approximately 1800 direct market industrial customers served by United.

5. The four-priority plan which under the automatic action of this Court's mandate has controlled curtailment on United's system since November 1, 1976, shall be modified as set out in paragraph 6-10 below.

6. Implementation of the four-priority plan shall be based on the factors and methods applied during the period from 1971 to 1973 when such plan was originally implemented. Provided however, such implementation shall be adjusted to the end-use data developed in Phase II of the Commission's proceeding as summarized in Exhibit No. 495 in that proceeding and supporting work papers.

7. United is directed to curtail any additional quantities of gas which its electric utility customers would otherwise receive as a result of the priority for electric utilities contained in the four-category program. In view of the lack of data necessary to resolve allegations that many of United's direct market industrial customers lack alternate fuel capability and would be irreparably injured by unmodified implementation of the four-category plan, United shall implement that plan in such a manner as to insure continued service to any such customer which United finds to lack alternate fuel capability.

8. When service is granted by United under conclusion (7), United shall promptly submit its justification to the Commission. Such justification shall include (1) demonstration of the lack of alternate fuel capability (on the basis of the customer's Alternate Fuel Capability Data Request Response); (2) presentation of the customer's affidavit that it has exhausted all available sources of natural gas and propane; (3) such other relevant information as United shall deem appropriate for the granting of the requested relief.

9. Any party to Commission Docket No. RP 71-29, et al., or the Commission staff, may challenge any delivery of gas to a direct market industrial customer of United. United shall respond to such challenge and have the burden to justify the additional service. The Commission shall adjudicate such challenge with all possible dispatch.

10. Nothing herein shall be construed to prevent the normal operation of the Commission's extraordinary relief procedures.

11. The Court retains jurisdiction in this show cause proceeding and reserves for decision the questions (a) whether United's April 1, 1976 tariff filing was made pursuant to Section 4 of the Natural Gas Act and superceded the prior mandate of this Court, or alternatively, whether the implementation of United's tariff filing was an exercise of the Commission's authority under Section 5(a) of the Natural Gas Act and renders such filing subservient to the prior mandate of this Court, and (b) whether United's April 1, 1976 tariff filing was invalid as a matter of law and should have been summarily rejected by the Commission.

12. The modified four-category program shall, subject to subsequent order of this Court on reserved issues, govern curtailments on United's system unless and until the Commission makes findings consistent with Section 5(a) of the Natural Gas Act and the prior mandate of this Court on whether the four-category plan is unjust and unreasonable.

13. The Commission shall proceed as promptly as possible to make the proper findings regarding the four-priority plan required of it by the prior mandate of this Court. In making those findings, the Commission is directed to adopt every expedited procedure consistent with due process. Because the modified application of the four-priority plan directed herein is being effectuated in the context of mandate enforcement rather than a determination of present merit, the Commission should reconsider its prior action in reserving the determination of the validity of the four-priority plan pending its resolution of a permanent curtailment plan for United's system. The direction for such reconsideration is not intended to indicate any decision on that issue by this Court. The imposition of the four-priority curtailment plan, as modified, shall not be considered by the Commission to be a determination by this Court on the merits of such plan's validity.

APPENDIX P

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

United Gas Pipe Line Company) Docket Nos. RP71-29, *et al.* (Phase II).

ORDER IMPLEMENTING COURT ORDER AND GRANTING MOTIONS

(Issued November 24, 1976)

On October 27, 1976, United Gas Pipe Line Company ("United") filed a motion to make effective on November 1, 1976, tariff sheets filed April 1, 1976, containing a new curtailment plan. On October 29, 1976, the United States Court of Appeals for the Fifth Circuit issued an order to this Commission and to United Gas Pipe Line Company ("United") to show cause why the Commission had not complied with the mandate in Louisiana Power *& Light Co. v. F.P.C.*, 526 F.2d 898 (5th Cir. 1976). requiring a Commission determination on the validity of the four-category plan adopted in Opinion No. 606[1] prior to any other plan going into effect on the United system this winter.[2]

On November 5, 1976, the Court issued a bench order requiring reimplementation of a modified form of the four-category plan. Based on the Court's accompanying suggestion that this Commission adopt "any short cuts consistent with due process" to get to an early determination

1. 49 FPC 786 (1971).

2. Based on petitions for review of orders, *Southern Natural Gas Company, et al. v. F.P.C.*, Nos. 76-3914, *et al.*

on the justness and reasonableness of the Opinion No. 606 four-category plan, motions for expedited consideration of this matter were filed on November 10 and 11, 1976, respectively, by the United Municipal Distributor Group ("MDG") and jointly by Entex, Inc., and Louisiana Gas Service Company (jointly "Entex"). On November 13, 1976, the Court entered its written findings and order, including the following directives:

> 12. The modified four-category program shall, subject to subsequent order of this Court on reserved issues, govern curtailments on United's system unless and until the Commission makes findings consistent with Section 5(a) of the Natural Gas Act and the prior mandate of this Court on whether the four-category plan is unjust and unreasonable.
>
> 13. The Commission shall proceed as promptly as possible to make the proper findings regarding the four-priority plan required of it by the prior mandate of this Court. In making those findings, the Commission is directed to adopt every expedited procedure consistent with due process. Because the modified application of the four-priority plan directed herein is being effectuated in the context of mandate enforcement rather than a determination of present merit, the Commission should reconsider its prior action in reserving the determination of the validity of the four-priority plan pending its resolution of a permanent curtailment plan for United's system. The direction for such reconsideration is not intended to indicate any decision on that issue by this Court. The imposition of the four-priority curtailment plan, as modified, shall not be considered by the Commission to be a determination by this Court on the merits of such plan's validity.

Based on the foregoing, we believe that we are required to remove the issue of the lawfulness of the four-category

plan from the Presiding Administrative Law Judge and to decide the issue directly.

The Commission finds:

In accordance with the order of the Court, it is appropriate and necessary to omit the initial decision with respect to the issue of the lawfulness of the four-category plan.

The Commission orders:

(A) The portions of record in this proceeding material and relevant to a determination of the issue of the lawfulness of the four-category plan shall be identified and certified to the Commission by the Presiding Administrative Law Judge as soon as is feasible after the close of the evidentiary hearing in Phase II for separate decision by the Commission.

(B) Initial briefs of the parties regarding the issue of the lawfulness of the four-category plan shall be filed with the Secretary of the Commission on or before fifteen days from the date of certification of the record pursuant to Paragraph A; reply briefs shall be filed within twenty-five days from the date of certification.

(C) The motions of MDG and Entex should be, and are, granted, consistent with the foregoing.

By the Commission.

Kenneth F. Plumb,

Secretary.

(SEAL)